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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Rosalyn Richter Justice PART 24

Balbuena, Gregorio

INDEX NO. 110868/00

MOTION DATE

- v -

MOTION SEQ. NO. 007

1 DR Realty

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

SCANNED OCT 23 2003

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

SCANNED OCT 22 2003

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 10/22/03

Rosalyn Richter J.S.C.

HON. ROSALYN RICHTER

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

HON. ROSALYN RICHTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

. X

GORGONIO BALBUENA and MARINA VEGA,

Plaintiffs,

Index No. 110868/00
Decision & Order

- against -

IDR REALTY LLC and DORA WECLER,

Defendants.

. X

IDR REALTY LLC and DORA WECLER,

Third-party Plaintiffs,

- against -

TAMAN MANAGEMENT CORP.,

Third-party Defendant.

. X

ROSALYN RICHTER, J.:

Plaintiffs Gorgonio Balbuena and Marina Vega move for (1) approval of the late filing of the instant motion for *summary* judgment, and (2) *summary* judgment as to liability in their favor against defendant IDR Realty LLC (IDR), on the ground that there are no contested factual issues regarding IDR's alleged violation of Labor Law § 240 (1).

Plaintiffs commenced this action to recover for injuries that Balbuena allegedly sustained while working as a laborer on a job site at a building located at 150 Orchard Street in Manhattan. At the relevant time period, IDR owned the property, and third-party defendant Taman Management Corp. was the contractor and the entity for whom Balbuena worked. According to Balbuena, at the time of the accident on April 25, 2000, he was pushing a wheelbarrow full of dirt up an interior ramp

in order to bring it outside the building that Taman was renovating. The wheelbarrow began to veer off the left side of the ramp and, to try to prevent this from happening, he "was caused to fall off the ramp to the ground below, a distance of approximately six feet."

Balbuena stated further that the wooden ramp had neither railings on either side, nor safety curbs to prevent the wheelbarrow from falling off the ramp, and that there was no safety netting in the area surrounding the ramp. Balbuena also stated that he "was not provided with any safety equipment whatsoever, including a safety belt, life line, or hard hat that would have offered fall protection." (Balbuena Affdavit, Exh. "P") He contends that he was injured when he fell off the ramp. Plaintiffs also allege that, as a result of the accident, Marina Vega, Balbuena's wife, has been substantially deprived of her husband's "services, society, aid, comfort and consortium, and the happiness of his well-being, except for some minor house work that he performs."

Plaintiffs contend that IDR is liable because it failed to provide Balbuena with proper protection as mandated by the Labor Law. The complaint also contains causes of action based upon common-law negligence. Plaintiffs are moving for *summary* judgment only as to the Labor Law § 240 (1) claim. In opposition to the motion, Taman argues that an issue of fact exists as to whether it was the statutory violation or Balbuena's alleged failure to adequately monitor, control, and treat his diabetes that proximately caused the accident.

It is undisputed that Balbuena began treatment for diabetes in 1984, by taking insulin, and that, prior to the accident, he did not consistently monitor his blood sugar level. His deposition testimony indicates that he may not have been taking sufficient doses of insulin to treat his diabetes prior to the accident. In support of its assertion that Balbuena's medical condition proximately caused the accident, Taman submitted an affirmation of Stephen B. Richardson, M.D., a board-

certified endocrinologist. Dr. Richardson examined Balbuena on March 7, 2002, and took a medical history, including information about his dietary habits and insulin taking. He also reviewed deposition testimony of both plaintiffs and of Balbuena's co-worker Yong Xing Chen, concerning Balbuena's long-standing diabetic condition, dietary habits, pre- and post-accident insulin intake, the physical nature of the construction work, and the observations concerning Balbuena's physical appearance. Dr. Richardson concluded that, on the day of the accident, Balbuena was "susceptible to hypoglycemia, which causes lightheadedness, dizziness, muscular weakness, mental confusion, pale skin, trembling, feeling shaky, poor coordination, and fainting."

As a preliminary matter, the Court concludes that plaintiffs motion should be decided on the merits, even though it slightly late. Defendants do not identify any prejudice arising from the late filing, and the trial of this matter has not been scheduled.

Labor Law 240 (1), which pertains to elevation-related risks, imposes absolute liability for a breach that causes injury. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991). Owners, contractors, and their agents are strictly liable for any breach of the duty to provide proper protection that proximately causes an injury. *McCann v. Central Synagogue*, 280 A.D.2d 298 (1st Dept 2001). The legislature intended to provide "exceptional protection" for workers against the special hazards that arise when the work site is elevated, and the law "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed." *Rocovich*, 78 N.Y.2d at 513-14.

The injured worker has the burden to establish that the statute was violated, and that the violation was a proximate cause of the worker's injuries. *Meade v. Rock-McGraw, Inc.*, 307 A.D.2d 156 (1st Dept. 2003). Here, it is essentially undisputed that, at the time of the accident, Balbuena was pushing a dirt-filled wheelbarrow up a wooden ramp, that was six feet above the ground and

located in a building owned by IDR. The accident occurred when he and the wheelbarrow fell off the left side of the ramp. The wheelbarrow veered to the left side, and Balbuena unsuccessfully attempted to stop it so that he would not fall off the ramp.

According to Balbuena, the wooden ramp did not have any railings or safety curbs to prevent the wheelbarrow from falling off the ramp, and it was not equipped with safety netting in the area surrounding the ramp. Balbuena's co-worker confirmed the assertion that the ramp did not have any side rails. Balbuena's uncontroverted testimony that he was injured when he fell six feet from a ramp that did not have railings or safety curbs establishes that the ramp did not have proper protection pursuant to Labor Law § 240 (1). *McCann v. Central Synagogue*, 280 A.D.2d 298. The work being performed on the six-foot high ramp constitutes an elevated-related risk, encompassed by Labor Law § 240 (1), and defendants do not claim otherwise. In fact, the very purpose of the railing or safety curb is to prevent the sort of accident that occurred here. Furthermore, plaintiffs need only show that the injuries were at least partially attributable to defendants' failure to take statutorily mandated safety measures to protect him from risks arising from an elevation differential. *Pardo v. Bialystoker Ctr. & Bikur Cholim,* Inc., __AD__, 764 N.Y.S.2d 409 (1st Dept 2003).

Although the strict liability benefit of Labor Law § 240 is not available to a worker whose own act in failing to use an otherwise adequate safety device properly is the sole proximate cause of his injury, *cf. Meade v. Rock-McGraw, Inc.*, 307 A.D.2d at 160, here there is no indication that Balbuena failed to properly use an otherwise adequate safety device, or that the accident resulted from Balbuena's wilful or intentional acts. *Tate v. Clancy-Cullen Storage Co.*, 171 A.D.2d 292 (1st Dept. 1991).

Taman argues that any statutory violation, such as the failure to provide a railing, is

inconsequential because Balbuena "was suffering the effects of hypoglycemia, causing him to be faint, lightheaded, and dizzy," and that this would have made him unable to avail himself of any safety device that might have been in place. First, any claim made by Taman's attorney that Balbuena was actually suffering the effects of hypoglycemia would be of no probative value because it is made only by counsel. *Lupinsky v. Windham Constr. Corp.*, 293 A.D.2d 317 (1st Dept. 2002). Dr. Richardson was only able to state that Balbuena was "susceptible" to hypoglycemia, but could not indicate what plaintiffs condition actual was at the time of the accident. Plaintiffs *summary* judgment motion cannot be defeated based upon speculation that Balbuena's condition may have contributed to the injury. *Kijak v.* 330 *Madison Ave. Corp.*, 251 AD2d 152, 154 (1st Dept. 1998).

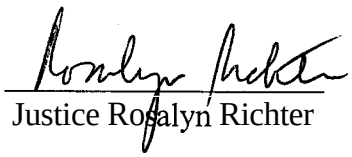
Furthermore, even if defendants were able to establish that Balbuena's medical condition caused him to become faint, lightheaded, or dizzy, they have not offered any evidence to show that the safety devices, if they had been in place, would not have aided in preventing the harm that occurred, notwithstanding Balbuena's condition. *Cf. Selja v. American Home Prods. Corp.*, *307* A.D.2d 840 (1st Dept. 2003). Indeed, once plaintiffs established that the violation of Labor Law § 240 (1) was a contributing cause of the accident, then any contributory negligence on the part of the worker will not relieve defendant of any liability. *Tate v. Clancy-Cullen Storage Co.*, 171 A.D.2d at 296 (alleged intoxication not a defense unless it is the sole cause of the accident). Here, it is uncontested that the ramp did not have any safety devices and Balbuena's conduct concerning his medication would, at most, constitute contributory negligence, which is not a defense to a Labor Law § 240 (1) claim. *Hernandez* v *151 Sullivan Tenant Corp.*, 307 A.D.2d 207 (1st Dept. 2003).

Accordingly, it is

ORDERED that plaintiffs' motion for *summary* judgment on its Labor Law 240(1) claim

against IDR is granted.

Oct. 21,2003



Justice Rosalyn Richter