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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 107960/2004

NURSE, DELANO

vs

REBCO ASSOCIATES

Sequence Number : 001

SJ

EX NO. _____

TION DATE _____

TION SEQ. NO. _____

TION CAL. NO. _____

The following papers, ion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

SEP 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: Aug 28, 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

Delano Nurse,

Plaintiff

-against-

Rebco Associates and
Tenber Associates, L.P.,

Defendants.

----------x

DECISION/ORDER
Index No.: 107960/2004
Seq. No.: 001, 002

Present:
Hon. Judith J. Gische
J.S.C

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	Numbered
Motion seq #001	
Defs' n/m [§3212] w/NLS and PM affid, exhs (sep backs)	1,2,3
Pltff's opp w/EMM affirm	4
Defs' reply w/JES affid	5
Motion Seq #002	
Pltff's n/m [partial §3212] w/EMM affirm, exhs	6
Defs' opp w/JES affid, exhs (sep backs)	7,8

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action to recover monetary damages for personal injuries plaintiff claims to have sustained as a result of alleged violations by defendants of sections 240, 241 (6) and 200 of the Labor Laws. Issue has been joined and plaintiff filed the note of issue on October 13, 2006. The court has before it motions by the defendants and plaintiff for summary judgment. Since they were brought within the time limitations set

forth in CPLR §3212, they will be considered and decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Facts and Arguments Presented

Plaintiff was employed by Stuart Dean Co., Inc. ("Stuart Dean"), a non party, at the time of his accident which took place on June 23, 2003. Stuart Dean had a contract with the defendants' managing agent (a non party) for the cleaning, restoration and preservation of the stainless steel and marble surfaces at the building located at 110 East 59th Street ("the building"). Defendant Rebco Associates owns the land, whereas defendant Tenber Associates, L.P. owns the building (collectively, the "defendants").

Plaintiff claims that while in the process of cleaning stainless steel that day, he was injured as he was attempting to erect the second level of a scaffold on the sidewalk in front of the building. Plaintiff was deposed and testified that when he stepped on the scaffold, a misplaced board gave way and he fell through the metal frame to the sidewalk some 10 feet below. He testified no one provided him with safety equipment that day, such as a hard hat, safety rope, harness or life line. He also testified that his foreman (Salvatore Marino) was responsible for the misplaced board and that at the time of his accident Mr. Marino was standing on the sidewalk smoking a cigarette.

Plaintiff contends that he was not engaged in routine interior office cleaning, but that he was cleaning the exterior of the building on an elevated surface, and therefore subject to the protections of the Labor Law. *See*: Broggy v. Rockefeller, 30 AD3d 204 *affd* 8 NY3d 675 (2007); Fox v. Brozman-Archer Realty, 266 AD2d 97 (1st Dept 1999); Bartaga v. Burdick, 261 AD2d 106 (1st Dept 1999). To support his motion he relies

upon his own EBT testimony and that of Mr. Marino who was also deposed.

Mr. Marino testified at his deposition that it was plaintiff who misplaced the board, and that he did not fall to the sidewalk, but landed on a pipe, injuring his groin. Mr. Marino testified on the day of his accident plaintiff was doing a monthly cleaning, using plain water and a rag to do his job. Mr. Marino testified plaintiff was not wearing any safety equipment at the time of his accident and the brakes on the scaffold were locked and the scaffold was immobilized. Mr. Marino acknowledged that he was standing on the sidewalk smoking a cigarette when plaintiff fell.

In support of his own motion for partial summary judgment on his section 240 (1) claim, and in opposition to defendants' motion to dismiss that claim (3rd cause of action) plaintiff argues there are no material factual disputes to be tried and it does not matter who misplaced the board on the scaffold, or whether he fell to the sidewalk or landed on a pipe because: 1) either way the board was dislodged, and 2) he fell. He contends that the brakes only prevented the scaffold from shifting, but were inadequate safeguards against his falling down from the scaffold.

Defendants oppose plaintiff's motion for summary judgment and seek summary judgment dismissing all his claims. They claim that the protections of Labor Law §§ 240 (1) and 241 (6) are inapplicable because plaintiff was merely performing routine maintenance at the time of his accident. They argue that the protections of Section 240 (1) only apply where a worker is engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Defendants rely on a number of appellate court decisions that they claim have narrowly construed "cleaning" to

routine maintenance in a non-construction and non-renovation context.

Defendant also contend that although plaintiff was using a scaffold at the time of his accident, the protections of Section 241 (6) only extend to "areas in which construction, excavation, or demolition work is being performed . . ." They contend that since none of these conditions were present when plaintiff was injured while doing his job, his accident is outside the protections of the Labor Law for this reason as well. Rukaj v. Eastview, LLC, 36 AD3d 519 (1st Dept 2007).

As per its contract with the defendants' managing agent dated November 19, 2002, Stuart Dean agreed to "furnish all necessary labor, material, scaffolding, and insurance to clean thoroughly, restore to its original satin finish, and preserve with multiple coats of clear synthetic materials to the following metal as maintenance . . ." The contract also specifies that "[t]he maintenance price does not include any additional work required for the removal of scratches or repair of any damages resulting from acts of vandalism . . ." Some surfaces were denominated as "C/O" or clean only in the contract and it is undisputed that plaintiff was involved in the "clean only" phase of his task when he was injured.

Law Applicable to Motions for Summary Judgment

"The 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 eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect

Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See*: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Discussion

Since plaintiff has only moved with respect to his section 240 (1) claim and he has not opposed (or even superficially addressed) defendants' motion for summary judgment dismissing his section 200 or common law negligence claims, they are severed and dismissed. Similarly, plaintiff appears to have abandoned his Labor Law § 241 (6) claim, and it is hereby severed and dismissed as well.

The remaining issue for the court to decide is whether, as plaintiff claims, the defendants violated Labor Law § 240 (1) which imposes a non-delegable duty upon an owner or general contractor to respond in damages for injuries a laborer sustains due to another party's negligence in failing to provide plaintiff with certain safety equipment.

Plaintiff urges the court to take into consideration that he was working on the exterior of the building and not indoors (and therefore performing a riskier task), whereas defendants urge the court to consider that plaintiff was not doing "cleaning" incidental to a construction, demolition or repair project. These very arguments have been heard and recently decided by the Court of Appeals in Broggy v. Rockefeller Group, Inc. (8 N.Y.3d 675 at 681 [2007]). The Court of Appeal has held that in deciding

whether to impose liability on an owner under Labor Law § 240 (1), the court should focus on whether particular task plaintiff was engaged in "creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect[s] against." Broggy v. Rockefeller Group, Inc., supra at 681. Labor Law § 240 expressly includes the "cleaning" of a building or structure, whether or not such cleaning is incidental to any of the activities enumerated in the statute (e.g. construction, demolition or repair). Consequently, it is irrelevant that there was no construction or demolition going on at defendants' building or that plaintiff was simply using a rag and water to clean its exterior stainless steel surfaces. Broggy v. Rockefeller Group, Inc., *supra*. He could not have cleaned the these surfaces without being elevated and being elevated, he was exposed to an elevation-related risk of falling. Defendants' motion for summary judgment on the basis that plaintiff was not doing cleaning incidental to a covered activity enumerated under Labor Law § 240 (1) must, therefore, be denied because plaintiff was engaged in activity protected by the statute (cleaning of a structure or building).

Although the cleaning that plaintiff was doing was scheduled, and defendants contend that it is therefore "routine," the cited legal authority they rely upon does not stand for that proposition. Plaintiff was not engage in, for example, "routine" cleaning of household windows (Brown v. Christopher Street Owners Corp., 87 NY2d 938 [1996]), but cleaning the exterior of a building (Bauer v. Female Academy of Sacred Heart, 97 NY2d 445 [2002]). Nor do defendants argue that plaintiff did not need a scaffold to do his job (Broggy v. Rockefeller Group, Inc., supra) (worker climbed up on table instead of

pushing it out of the way). The court now considers whether plaintiff is entitled to summary judgment, or whether there are factual disputes that warrant the denial of his motion.

Plaintiff contends that he is entitled to summary judgment because he was standing on a scaffold without any safety devices, like a harness, lifeline or rope to stop him from falling and therefore he could not do his job safely. At the time of his accident, the scaffold plaintiff was using was several feet off the ground (he alleges 10 feet). It consisted of an open metal frame upon which boards or planks were put down or installed. Although the scaffold had brakes, and according to plaintiff's foreman they were locked and the scaffold immobilized at the time of plaintiff's accident, plaintiff contends he fell through an opening created on the scaffold floor when a board became dislodged and gave way. Plaintiff claims that defendants' failure to provide him with any safety devices was a proximate cause of his accident. Montalvo v. Petrocelli Constr., 8 AD3d 173, 175 (1st Dept 2004); Tate v. Clancy-Cullen Storage Co., Inc., 171 AD2d 292 (1st Dept 1991). Plaintiff has established there was a violation of section 240. He was provided with a scaffold with which to do his job, but no safety device to prevent his fall from it. He fell through an opening when a board became dislodged. Thus, there was an elevation-related risk in doing his job, and he was not provided with adequate safety devices. Broggy v. Rockefeller Group Inc., *supra*. This violation was a proximate cause of his injuries. Reinoso v. Ornstein Layton Mgt., Inc., 19 AD3d 678 (2nd dept 2005).

In opposition, defendants have not come forward with any material disputed issues of fact. Although they claim it makes a difference that plaintiff fell *through* the

scaffold and not *off* it and that he landed on a pipe, but did not fall all the way to the sidewalk, these are distinctions without a difference, for the purposes of determining liability under the facts of this case. Even were defendants able to prove its facts at trial, there is no factual dispute in this record that plaintiff suffered a "fall" (height differential) and therefore sustained an elevation related injury subject to the protections of Labor Law § 240 (1). *See:* Misseritti v. Mark IV Constr. Co., 86 NY2d 487 (1995); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 (1993) Rocovich v. Consolidated Edison, 78 NY2d 509, 512 (1991); O'Connor v. Lincoln Metrocenter Partners, L.P., 266 AD2d 60 (1st dept. 1999); Carpio v. Tishman Construction Corporation of New York, 240 AD2d 234 (1st dept. 1997).

For purposes of liability under section 240(1), a worker's contributory negligence is not a defense in the absence of safety devices to prevent a fall, etc. Bland v. Mocherian, 66 NY2d 452 (1985); Becerra v. City of New York, 261 AD2d 188 (1st dept. 1999). Defendants make no claim that plaintiff was the sole proximate cause of his injuries or that he was a recalcitrant worker. Montgomery v. Federal Express Corporation, 4 NY3d 805 (2005); Blake v. Housing Services of New York City, 1 NY3d 280 (2003); (Orellano v. 29 East 37th Street Realty Corp., 292 A.D.2d 289, 291 (1st dept 2002). Therefore they have no defenses that would allow them to avoid liability under the statute.

Plaintiff has proved he is entitled to summary judgment on his section 240 (1) claim. There are no material factual disputes that require a trial before the issue of liability can be decided. Therefore, his motion is granted and defendants' motion for

summary judgment is denied.

Since the note of issue has been filed, the issue of damages is ready to be tried. Plaintiff shall serve a copy of this decision on the Trial Support Office so that it may be scheduled for trial.

Conclusion

Defendants' motion for summary judgment is granted as to plaintiff's Labor Law §§ 241 (6), 200 and common law negligence claims. It is, however, denied as to plaintiff's Labor Law § 240 (1) claims. Plaintiff's motion for summary judgment against the defendants on his Labor Law § 240 (1) claims is granted and the issue of damages is referred for trial. Plaintiff shall serve a copy of this decision on the Trial Support Office so that the trial may be scheduled.

Any relief not expressly addressed has nonetheless been considered and hereby denied. This shall constitute the decision and order of the court.

Dated: New York, New York
August 28, 2007

So Ordered:

Hon. Judith J. Gische, JSC