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

PRESENT: Hon Joan A. Madden PART 11

Index Number : 103124/2005

ZHAO, JUNENG

VS

ISLA NENA HOUSING DEVELOPMENT

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5-31-07

MOTION SEQ. NO. _____

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	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision + Order,

FILED

SEP 24 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Sept 18, 2007

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, IAS PART 11
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JUNENG ZHAO,

Plaintiff,

-against-

ISLA NENA HOUSING DEVELOPMENT FUND COMPANY, INC. AND LOWER EAST SIDE COALITION, INC.,

Defendants.
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JOAN A. MADDEN, J.:

Plaintiff Juneng Zhao (hereinafter "Zhao") moves for summary judgment as to liability on his Labor Law § 240(1) claim. Defendants Isla Nena Housing Development Fund Company, Inc. (hereinafter "Isla Nena") and Lower East Side Coalition (hereinafter "Coalition") oppose the motion. For the reasons set forth below, the motion is granted.

Background

This is an action to recover damages for personal injuries allegedly sustained by Zhao on July 30, 2004, when he fell from a height at a construction site located at 743-744 East 5th Avenue, between Avenue C and D in lower Manhattan. The project under construction was a 48-unit, low income, residential building.

Defendant Isla Nena, a subsidiary of Coalition, owns the property. Defendants hired Phoenix Builders, Inc. (hereinafter "Phoenix") to be the general contractor on the project. Zhao was

an employee of Phoenix. At the time of the accident, the concrete foundation for the project had been laid, the steel beam structure for the first and second floor had been completed, and workers were in the process of completing the steel structure for the third floor.

At his deposition, Zhao testified that on the day of the accident, he was assigned the job of moving heavy steel plates to be placed atop steel beams. His work assignment required him to cross a narrow steel beam as he carried the plates. He described the beam as being "very narrow, maybe about one foot wide", and located between the second and third floors(Zhao dep. at 19). Zhao also testified that the steel plate measured approximately two feet by twelve feet (Zhao dep. at 12).

Zhao testified that the accident occurred as he was walking on the beam and carrying the heavy plate with a co-worker when he somehow fell to the concrete floor below hitting his head and back. Zhao further testified that there were no toe holds[1] available to walk across the beams and that he was not provided with any safety belt, safety rope, safety harness, netting or other protective devices to prevent his fall.

Zhao argues that he has made out a prima facie case warranting summary judgment under Labor Law § 240(1), as his

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[1]Toe holds are planking provided to workers to walk on when there are elevated beams without flooring.

injuries were proximately caused by the absence of proper safety devices to protect him while working at an elevated work site.

In opposition, the defendants argue that summary judgment must be denied as the record raises triable issues of fact regarding Zhao's claim that there was a lack of safety devices and equipment as required by law.

In support of their argument, defendants rely on an affidavit from Nancy Chan, the general manager of Phoenix. Although not an eyewitness, Chan states that all necessary safety precautions and devices were in place to prevent the kind of fall which Zhao claims he suffered, and thus there was no violation of the Labor Law.

In reply, Zhao argues that Nancy Chan's affidavit has no evidentiary value as she was not a witness to the accident, and that defendants have provided no documentary or other evidence, such as construction progress photographs or safety meeting minutes, to support Chan's statement that there were adequate safety devices at the work site. Zhao also points out that defendants' representative, who was on site at the time of the accident, could not state at his deposition that any safety equipment was provided to Zhao at the time of the accident.

Discussion

On a motion for summary judgment, the proponent "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…" Winegard v New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof, in admissible form, to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Section 240(1) of the Labor Law imposes absolute liability on building owners, general contractors, and their agents for injuries to workers engaged in "the erection, demolition, repairing…of a building or structure," which results from falls from ladders, scaffolding, or other similar elevation devices that do not provide "proper protection" against such falls. Melo v. Consolidated Edison of New York, Inc., 92 N.Y.2d 909 (1998). The statute imposes a non-delegable duty on an owner to provide adequate safety measures at the work site, and is to be construed liberally to accomplish its purpose of placing the ultimate responsibility on the owner and general contractor, rather than individual workers, for safety practices. Zimmer v. Chemung Council for Performing Arts, Inc., 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985).

To establish liability, a plaintiff must prove that the statute was violated and that the violation was a proximate cause of the injuries sustained. Bland v. Manocherian, 66 N.Y.2d 452

(1985). Proximate cause is demonstrated based on a showing that a "defendant's act or failure to act as the statute requires 'was a substantial cause of the events which produced the injury.'" Gordon v. Eastern railway Supply, Inc., 82 N.Y.2d 555, 562 (1993) (citation omitted). It is not necessary for the plaintiff to demonstrate that the precise manner in which the accident occurred, or the extent of the injuries, was foreseeable. Rodriguez v. Forest City Jay Street Associates, 234 A.D.2d 68 (1st Dept. 1996), citing Public Administrator of Bronx Country v. Trump Village Construction Corp., 177 A.D.2d 258 (1st Dept. 1991). Comparative negligence is not a defense. See Blake v. Neighborhood Housing Services of New York City, Inc., 1NY3d 280, 289-290 (2003).

Under the above principles, and based on Zhao's deposition testimony that he fell from an elevated steel beam and that no safety devices were provided to protect him from injury, Zhao has made a prima facie showing entitling him to summary judgment as to liability on his Labor Law § 240(1) claim.

Moreover, defendants have failed to controvert this showing by providing evidence that raises triable issues of fact. Contrary to defendants' argument, Nancy Chan's affidavit is insufficient to raise a triable issue of fact as to the existence or availability of safety devices at the time of the accident, since she was not at the construction site when the accident

occurred, and thus lacks any personal knowledge. Furthermore, Chan's assertions that safety devices and precautions were provided pursuant to the law, does not address whether there were any safety equipment provided and precautions taken at the time and place of Zhao's fall. Moreover, defendants provide no evidence to substantiate Chan's statements.

Accordingly, Chan's affidavit constitutes speculation and does not provide a basis for denying Zhao's summary judgment motion. See e.g., Washington v. G & L Auto Corp., 20 A.D.3d 332, 332-333 (1st Dept. 2005) (non-eyewitness statement form defendant's principal regarding the circumstances of accident was "rank speculation" and insufficient to defeat summary judgment motion); Bruce v. Fashion Square Assocs., 8 A.D.3d 1053, 1054 (4th Dept. 2004) (granting partial summary judgment on plaintiff's Labor Law § 240(1) claim despite deposition testimony by his employer's general manager that at the time of accident, plaintiff was performing routine maintenance outside the statute's coverage, when the general manager lacked personal knowledge and thus his testimony constituted "speculation founded upon hearsay"); Grgas v. Lehrer McGovern Bovis, Inc., 307 A.D.2d 982 (2d Dept. 2003) (evidence submitted in opposition to plaintiff's motion for summary judgment on his Labor Law claim, including foreman's inadmissible hearsay statement, was insufficient to raise triable issue of fact).

Accordingly, as defendants have failed to sufficiently counter Zhao's prima facie showing entitling him to summary judgment on his Labor Law § 240(1) claim, plaintiff's motion must be granted.

Conclusion

In view of the above, it is

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

ORDERED that a pre-trial conference shall be held on October 25, 2007 at 2:30 pm in Part 11, room 351, 60 Centre Street.

Dated: September 18, 2007

J.S.C.