[* 1]

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

PRESENT: WALTER B. TOLUB Justice

PART 15

Index Number : 107293/2005
IVANOV, VASYL
VS
170 EAST END AVENUE LLC
Sequence Number : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5.4.07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/9/07

WALTER B. TOLUB 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 15

----------x

VASYL IVANOV,

Plaintiff,

-against-

170 EAST END AVENUE LLC.,

Defendant.

----------x

Index No.: 107293/05
Motion Seq. 002

Tolub, J.:

This is an action to recover damages sustained by a worker when he fell from a ladder while working at a construction site. Plaintiff Vasyl Ivanov moves, pursuant to CPLR 3212, for summary judgment on the issue of liability under Labor Law § 240(1). Defendant-Owner 170 East End Avenue LLC. ("170 East End") cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's common-law negligence and Labor Law §200 claims.

BACKGROUND

On the morning of his accident, plaintiff was employed by Bedrock Contracting Inc. (Bedrock) as a burner. Defendant, who had hired Bedrock for certain demolition work, owned the building where plaintiff's accident took place. Plaintiff testified that, at the time of his accident, he was in the process of demolishing a drop ceiling supporting structure with a gas blow torch on the third floor of the building.

In order to perform his task, plaintiff was standing on an A-frame ladder which was not tied off or secured, though it was

in its fully opened position and standing on a level, clean area. Plaintiff also stated that he had inspected the eight-to-ten-foot high ladder prior to using it and found it to be in good working order and not defective in any way. During his work, it was necessary for plaintiff to routinely move up and down the ladder. In fact, plaintiff had climbed up and down the ladder, which had been supplied to him by Bedrock, several times in the half hour before his accident.

Plaintiff explained that the ceiling of the room where he was working was almost two stories high and approximately eight feet above his head as he stood approximately six feet up on one of the ladder's rungs. Plaintiff's blow torch was able to reach the drop ceiling hardware because it was six feet long. As plaintiff was standing straight up with his elbows propped on the top of the ladder and while looking upwards toward the hangers which were holding up the ceiling that he was in the process of cutting, a two-inch by five-or six-foot long piece of pipe dropped from the ceiling, swiping plaintiff and then striking the side of the ladder, causing the ladder to tip over to the right and plaintiff to fall to the ground and become injured.

Plaintiff maintained that he did not see the see the pipe until it was falling. Plaintiff stated that he was not sure of how the pipe originally came to be resting in the ceiling, though it was possible that it was either left there by demolition

workers or "sitting there since the time the building was built" (Notice of Motion, Ex. 2, Ivanov Deposition, at 73). In addition, plaintiff stated that the pipe was not attached to anything at the time that it fell, and it was not a pipe that had been cut by plaintiff.

Plaintiff testified that, as he had been working by himself, no one witnessed his accident. Plaintiff also noted that he had not requested an assistant on the day of his accident, though sometimes he had been given one. In addition, prior to working on the third floor, plaintiff had taken down ceilings on other floors without any incidents or problems.

Carl Trop (Trop), managing director of a holding company called Garden Homes, testified that defendant was one of the entities under the Garden Homes umbrella and that Garden Homes is "a convenient summation of about 1,000 different entities, mostly limited liability corporations" which acquires, manages and leases properties for its owner (Notice of Motion, Ex. 2, Trop Deposition, at 5). Trop stated that defendant did not supervise Bedrock's work or dictate to it how to carry out the demolition of the building.

DISCUSSION

"'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'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006], quoting Winegrad v NYU Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]; Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept 2006]). 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]; Grossman v Amalgamated Housing Corp., 298 AD2d 224, 226 [1st Dept 2002]).

LABOR LAW § 240 (1)

Labor Law § 240 (1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> 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) 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-Electric Co., 81 NY2d 494, 501 [1993]). The Scaffold Law does not apply merely because work is performed at elevated heights, but also applies where the work itself involves risks related to differences in elevation (Binetti v MK West Street Co., 239 AD2d 214, 214-215 [1st Dept 1997]; see Ross, 81 NY2d at 500-501]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc., 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, it should be noted that, as owner of the premises where plaintiff was injured, defendant would be liable for any violation of Labor Law § 240 (1) that proximately caused plaintiff's injuries.

In the instant case, plaintiff does not assert that the ladder at issue was defective, nor does he rely on a "falling object" theory of liability, but rather alleges that defendant's failure to properly secure the ladder or to provide a safety device led to his injuries caused when the ladder fell to its

side (see also Montalvo v J. Petrocelli Construction, 8 AD3d 173, 174 [1st Dept 2004]). To this effect, plaintiff asserts that, as the ladder was inadequately secured so as to protect him while subject to an elevation-related risk, and as no other safety devices were provided to him, defendant is liable for his injuries under Labor Law § 240 (1).

Here, as it is uncontradicted that plaintiff was injured due to the failure of defendant to provide adequate safety devices to secure the ladder on which he was working, and since the risk of falling is one covered by the statute, plaintiff has established a violation of Labor Law § 240 (1). "'Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to insure that it remain stable and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (Montalvo, 8 AD3d at 174 [where plaintiff was injured as a result of unsteady ladder, plaintiff did not need to show that ladder was defective for the purposes of liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting Kijak v 330 Madison Avenue Corp., 251 AD2d 152, 153 [1st Dept 1998]; Klein v City of New York, 89 NY2d 833, 835 [1996]; Peralta v American Telephone and Telegraph Co., 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the

unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]; Chlap v 43rd Street-Second Avenue Corp. 18 AD3d 598, 598 [2d Dept 2005]).

Nor does the fact that the ladder was caused to tip over by the falling pipe eliminate negligence on the part of the defendant as a proximate cause of plaintiff's accident, as a pipe falling from a ceiling during a demolition activity is not "such an extraordinary event as to constitute a superceding cause" (Montalvo, 8 AD3d at 175 [fact that accident was caused by falling casing that plaintiff was holding did not eliminate general contractor's negligence in providing safety device as proximate cause of plaintiff's accident since striking of ladder by falling object was not such an extraordinary event as to constitute superceding cause]; Rivera v Dafna Construction Co., Ltd., 27 AD3d 545, 545 [2d Dept 2006] [plaintiff entitled to summary judgment on his Labor Law § 240 (1) cause of action where no safety devices were provided to plaintiff which might have prevented his accident caused when a large portion of the ceiling he was demolishing collapsed, causing the unsecured ladder he was standing on to become unsteady]; Dunn v Consolidated Edison Co. of New York, 272 AD2d 129, 129 [1st Dept 2000] [ladder used by plaintiff was not an adequate safety device for the task plaintiff had been directed to perform, which entailed removing

heavy pipe components at a significant elevation]; Spaulding v Metropolitan Life Ins. Co., 271 AD2d 316, 316 [1st Dept 2000] [ladder used by plaintiff inadequate to protect him from the foreseeable elevation-related risk of the work in which he was engaged]; Vasquez v Chase Manhattan Bank, N.A., 266 AD2d 3, 4 [1st Dept 1999] [where an air conditioning duct fell on the scaffold on which plaintiffs were working removing asbestos, Court noted that "[g]iven the nature of the work, an object falling from the ceiling cannot possibly be viewed as an extraordinary event"]; Quinlan v Eastern Refractories Co., 217 AD2d 819 [3d Dept 1995] [in finding that the placement of the ladder without any protection was a violation of Labor Law § 240 (1), Court noted that it was a foreseeable risk that a stepladder, placed in the midst of defendant's warehouse operation, could be knocked over by machinery and material involved in the warehouse operation. In addition, "[t]he fact that the material which struck the ladder fell for an unknown reason does not constitute such an extraordinary event as to create a supervening cause"]).

In support of its motion to dismiss plaintiff's Labor Law § 240 (1) claim against it, defendant argues that, as plaintiff failed to properly secure the ladder by asking for an assistant to hold it, or by utilizing a safety harness, plaintiff was the sole proximate cause of his injuries. As such, defendant is not

liable for plaintiff's injuries under the Labor Law statute.

Where plaintiff's own actions are the sole proximate cause of the accident, there can be no liability under Labor Law § 240 (1) (see Robinson v East Medical Center, LP, 6 NY3d 550, 554 [2006] [plaintiff's own negligent actions in choosing a ladder he knew was too short for the work to be accomplished, and then standing on the ladder's top cap in order to reach the work, were, as a matter of law, the sole proximate cause of his injuries]; Montgomery v Federal Express Corp., 4 NY3d 805, 806 [2005]; Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35, 39 [2004][where an employer has made available adequate safety devices and an employee has been instructed to use them, the employee may not recover under Labor Law § 240 (1) for injuries caused solely by his violation of those instructions]).

However, where "the owner or contractor fails 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 [internal quotation marks and citations omitted]" (Tavarez v Weissman, 297 AD2d 245, 247 [1st Dept 2002]). In such a case, comparative fault is not a defense to a Labor Law § 240 (1) cause of action because the statute imposes absolute liability once a violation is shown (Bland v Manocherian, 66 NY2d 452, 460 [1985]; Lopez v Melidis, 31 AD3d 351, 351 [1st Dept 2006]; Peralta, 29

AD3d at 494 [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranted a finding that the owners were absolutely liable under Labor Law § 240 (1), notwithstanding claims of comparative negligence or unsupported claims that plaintiff's conduct was the sole proximate cause of her injuries]).

Here, the fact that defendant's actions or omissions were a proximate cause of plaintiff's injuries is established as a matter of law by the undisputed fact that, while subjected to an elevation-related risk, plaintiff fell as a result of an unsecured ladder (see Ranieri v Holt Construction Corp., 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; Loreto v 376 St. Johns Condominium, 15 AD3d 454, 455 [2d Dept 2005] [since it was uncontested that the plaintiff fell from an unsecured ladder which slipped out from underneath him, the Court properly determined that the plaintiff was entitled to summary judgment on the issue of liability on his cause of action to recover damages for violation of Labor Law § 240 (1)]; Samuel v Simone Development Co., 13 AD3d 112, 113 [1st Dept 2004] [defendant's failure to provide a properly secured ladder or any safety

devices was a proximate cause of plaintiff's fall, and plaintiff's alleged drug use could not be the sole proximate cause of his injuries]; Torres, 12 AD3d at 262 [Court noted that even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident]).

The case at bar can be distinguished from the case of Blake, cited by defendant in support of its argument that plaintiff was the sole proximate cause of his injuries. In that case, although there were adequate safety devices available for the plaintiffs' use at the job site, and the plaintiffs knew that the safety devices were available and that they were expected to use them, the plaintiffs nevertheless and for no good reason chose not to do so.

Here, there is no evidence in the record to indicate that plaintiff was given any specific instruction that he should utilize an assistant to hold the ladder, nor was he ever offered any safety devices, such as a safety harness, which he refused to utilize. Plaintiff also testified that, although he sometimes wore a safety harness which was available to him, he was not able to wear one at the time of his accident as it would have limited

his range of motion and movement, there was nothing to secure it to, and it was not necessary for work performed only six feet above the ground. In addition, at general safety meetings run by his foreman, plaintiff was told that, as a rule, safety harnesses were not used on ladders. Further, no one offered plaintiff a safety harness before he went up on the ladder on the day of his accident or told him that he must wear one.

Thus, this is not a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (see Olszewski v Park Terrace Gardens, 306 AD2d 128, 128-129 [1st Dept 2003]; DePalma v Metropolitan Transportation Auth., 304 AD2d 461, 461 [1st Dept 2003] [Court rejected a recalcitrant worker defense where there was no evidence that plaintiff's decedent had refused to use a safety harness, and the fact that safety harnesses may have been available at the work site was insufficient to allow defendants to escape Labor Law § 240 (1) liability]; Morrison v City of New York, 306 AD2d 86, 87 [1st Dept 2003]; Crespo v Triad, Inc., 294 AD2d 145, 147 [1st Dept 2002]; Sanango v 200 East 16th Street Housing Corporation, 290 AD2d 228, 228-229 [1st Dept 2002]).

In addition, the fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment on his behalf (see Rivera, 27 AD3d at 545; Perrone v Tishman Speyer Properties, L.P., 13 AD3d 146, 147 [1st Dept 2004]). Thus,

plaintiff is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim as against defendant.

COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS

Defendant cross-moves for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against it. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work' [citation omitted]" (Cruz v Toscano, 269 AD2d 122, 122 [1st Dept 2000]; see also Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

> "1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

As discussed previously, plaintiff was demolishing a ceiling when a pipe dropped and hit the ladder he was standing on, causing it to tip over and plaintiff to fall and sustain injury. Although the parties in this case discuss the issue of supervision, or lack thereof, on the part of defendant, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff's injuries arose from an unsafe condition

present at the construction site. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (Murphy v Columbia University, 4 AD3d 200, 202 [1st Dept 2004]).

Here, plaintiff maintained that he did not see the see the pipe until he and the ladder were in the process of falling over. Plaintiff stated that he was not sure of how the pipe originally came to be resting in the ceiling, though it was possible that it was either left there by demolition workers or "sitting there since the time the building was built" (Notice of Motion, Ex. 2, Ivanov Deposition, at 73). In addition, plaintiff stated that the pipe was not attached to anything at the time that it fell, and it was not a pipe that had been cut by plaintiff.

Thus, there is no evidence in the record to indicate that anyone knew how the pipe came to be in the ceiling or how long it had been there. As plaintiff has not established that defendant created or had actual or constructive notice of the unsafe condition that caused plaintiff's accident in this case, defendant is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability under Labor Law §240 is granted; and it is

further

ORDERED that defendant's cross motion for summary judgment and dismissal of plaintiff's common law negligence and Labor Law § 200 claims is granted; and this portion of the complaint is dismissed; and it is further

ORDERED that the remainder of the action shall continue.

This constitutes the decision and order of the Court.

DATED: 10/9/07

ENTER:

Hon. Walter B. Tolub, J.S.C.