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

PRESENT: _____ PART 10

Justice

Index Number : 110096/2006
MININNO, STEPHEN
vs
MEGA CONTRACTING
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

FILED
JUN 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

IS DECIDED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 21, 2008

_____ 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 10

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STEPHEN MININNO,

Plaintiff,

- against -

MEGA CONTRACTING, INC., HANCOCK PLACE APARTMENTS HOUSING DEVELOPMENT FUND CORPORATION, HANCOCK PLACE APARTMENTS ASSOCIATES, L.P., CITY OF NEW YORK and THE NEW YORK CITY HOUSING PRESERVATION AND DEVELOPMENT,

Defendants.

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Decision/Order
Index No. 110096/06
Sequence No. 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**
Pltff's n/m (§3212) w/SLK affirm, SM affid, exhs	1
Defs MCI, HDFC, HPAA opp w/DAP affirm, AB, GS affid, exhs	2
Pltff's reply w/SLK affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE, J.:

Plaintiff Stephen Mininno brought this action to recover for injuries sustained when he fell off a scaffold at a construction site. Plaintiff now moves for summary judgment against Mega Contracting, Inc. ("Mega"), the general contractor, and Hancock Place Apartments Housing Development Fund Corporation and Hancock Place

Apartment Associates, L.P., the owners of the building that was under construction.

Issue has been joined and this motion was brought within 120 days of the note of issue which was filed on December 7, 2007. Since the motion was timely made, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Arguments made and facts considered

Subcontractor Metropolis General Contractors, plaintiff's employer, was responsible for the masonry work on the building. Plaintiff was a leadman on the project. He explains that a "leadman is a brick mason that lays out the first two courses (a bonding wall) and then the brick masons come and follow exactly what the leadman did" (Mininno Affidavit, ¶ 2). Giuseppe Soresi and Alex Bognor, Mega employees, supervised and directed work on the project.

Plaintiff testified as follows when he was deposed. On July 10, 2006, the day before the accident, plaintiff was told to lay out windows at the back of the building. He mounted a scaffold to do this work. The scaffold was on the outside of the building in front of the window being constructed. The scaffold consisted of walk boards, where the workers stood as they worked, and supply boards, two feet above the walk boards, where supplies and tools were kept. There were no guardrails or safety rails on the scaffold.

It started to rain that day, so work stopped at about 9:00 a.m. and plaintiff left. The next day, July 11, 2006, plaintiff says, Soresi instructed him to start laying down the steel lintels for a window at the same place he worked the previous day, on the scaffold at the back of the building. The scaffold was three levels high. Plaintiff walked through

the building and stepped through the window space onto the second level or floor of the scaffold. From plaintiff's feet to the ground, the drop was approximately 17 feet.

Plaintiff alleges that two other people were on the scaffold with him, Soresi and a laborer. The three of them placed the steel lintels in the window frame. Subsequently, Soresi and the other laborer left, but plaintiff stayed behind. According to plaintiff's depostion, this was to make some minor adjustments to the lintels.

Plaintiff claims that the next stage of work at that window required that the walk boards be elevated. Plaintiff testified at his EBT that the walk boards could not be lifted because of where the supply boards were positioned. Plaintiff contends that the supply boards of the scaffold were shifted about two inches too far forward towards the wall of the building and when he noticed this, decided to shift the supply boards so that the walk boards could be lifted. Plaintiff asked another worker to hand him a 2x4 board from the floor of the building, which the worker did. Plaintiff has testified he intended to use the 2x4 to nudge the supply boards into their proper position so the walk boards could be raised. Plaintiff set the 2x4 in place and as he stepped back to nudge the 2x4, he stepped off the scaffold falling to the ground below. He broke his leg in several places. These events took place at approximately 7:30 a.m.

At his deposition and in his affidavit in opposition to plaintiff's motion, Soresi states that he did not, in fact, order plaintiff to work at the back of the building on the day of the accident. Soresi states further that he and the other laborer did not work with plaintiff, and that it was not plaintiff's job to move or reposition the walk boards of the scaffold. Soresi has testified that on the day of the accident, Metropolis was working alongside the building, not at the back of it, and that there were guardrails on the

scaffold at the side of building. Soresi has testified that work at the back of the building had ceased and plaintiff should not have been there.

Bognor's account differs from Soresi's. At his deposition, Bognor testified that, on the day of the accident, plaintiff and other workers were installing steel lintels in the window where plaintiff was working when the accident occurred.

Plaintiff contends that the failure to provide guardrails and other proper safety devices are violations of the Labor Law [sections 240 (1), and 241 (6)]. Although he has also asserted a claim under Labor Law section 200 (common law negligence), he has only moved for partial summary judgment on his section 240 (1) and 241 (6) claims.

Labor Law § 240 (1), commonly referred to as the "scaffold law," provides that contractors and owners erecting a building must furnish safety devices for the workers. Scaffolding must be so constructed and erected as "to give proper protection" to the worker (Labor Law § 240 (1); *Bland v Manocherian,* 66 NY2d 452, 461 [1985]). In order to prevail on a claim arising out of section 240 (1), a plaintiff must establish both that protective devices were not furnished and that such failure was a proximate cause of his injuries (*see Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]; *Vergara v SS 133 W. 21, LLC,* 21 AD3d 279, 280 [1st Dept 2005]; *Samuel v General Cinema Theaters,* 254 AD2d 85, 86 [1st Dept 1998]). There may be more than one proximate cause of the accident (*Pardo v Bialystoker Center & Bikur Cholim, Inc.,* 308 AD2d 384, 385 [1st Dept 2003]). A plaintiff under Labor Law § 240 (1) need only show that the injuries were at least partially attributable to defendants' failure to take statutorily mandated safety measures (*id.*).

Plaintiff has made a prima facie showing that the scaffold did not have guardrails, that their absence caused him to fall to the ground, and that had they been present, he would not have fallen (*see Lezcano v Metropolitan Life Ins. Co.,* 11 AD3d 303, 303 [1st Dept 2004]; *Crespo v Triad, Inc.,* 294 AD2d 145, 146 [1st Dept 2002]). Therefore, the absence of guardrails was a proximate cause of his fall.

Defendants contend that plaintiff was the sole proximate cause of his accident and had he followed instructions, and done only what he was instructed to do, he would not have fallen. They contend that plaintiff was working at the back of the building, but he should not have been in that area which was off limits. Further, defendants contend that plaintiff had no business moving walk boards at any time. Defendants argue that there were guardrails on scaffold where plaintiff should have been, but since he worked elsewhere, he brought about his own accident. Defendant also contend that the scaffold had cross bracing to protect workers from falling and that there were no open ends to the scaffold. They have not provided any proof, however, that such cross bracing does anything more than provide strength and stability to the structure of the scaffold, and it is not a protective device for the worker against falling off.

Discussion

In deciding whether the plaintiff is entitled to the grant of summary judgment in his favor, the court considers whether he has tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Zuckerman v. City of New York , 49 N.Y. 2d 557, 562 (1980). If met, the burden shifts to defendants who must then demonstrate the

existence of a triable issue of fact in order to defeat the motion. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, *supra*.

Contributory negligence is not a defense to a prima facie showing of section 240 (1) liability (*see Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003]). Only a showing that plaintiff was solely responsible for his or her accident can defeat a prima facie showing (*id.* at 287).

Even assuming that plaintiff was a contributing factor in the happening of his accident, defendants have failed to prove that he was the sole proximate cause of it. While his own poor judgment may have resulted in his accident, adequate safety measures were not taken by the defendants and there were areas of scaffolding without any guardrails.

Defendants argue that plaintiff was acting outside of the scope of his work when he fell, and that he was in an area that was off limits. Thus, they contend they had no control over what his actions once that happened, and therefore no liability under Labor Law § 240 (1). Butt v. Bovis Lend Lease LMB, Inc., 47 AD3d 338, 340 (1st Dept 2007); Balthazar v. Full Circle Const Co., 268 AD2d 96, 98 (1st Dept 2000). However, defendant have failed to raise issues of fact for trial. Plaintiff's decision to adjust the boards himself was not so far out of the customary scope of what he did at work so as to be considered recalcitrance. Plaintiff testified at his EBT that the masons and laborers customarily work or help each other and that he had personally shifted supply boards on other occasions, using the same method he planned to use on the day of his accident. Plaintiff also estified at his EBT that after he raised the boards, he intended to continue working at that spot. Therefore, without raising the boards, he

could not get his work done.

In any event, a worker need not be performing his assigned duties at the time of the accident to be accorded the protection of section 240 (1) (*see Destefano v City of New York,* 39 AD3d 581, 582 [2d Dept 2007] [plaintiff was performing work ancillary to the task he was hired to do]; *Roberts v Caldwell,* 23 AD3d 210, 210 [1st Dept 2005] [plaintiff was helping coworkers with tasks related to his usual work]; *Calaway v Metro Roofing and Sheet Metal Works, Inc.,* 284 AD2d 285, 286 [1st Dept 2001] [although plaintiff exceeded instructions, he was performing related tasks]; *Rivera v Sealand Contr. Corp.,* 166 Misc 2d 689, 695-696 [Sup Ct, Monroe County 1995] [plaintiff attempted to rescue co-worker from falling]). Even assuming that plaintiff was ordered not to use a particular area of the scaffold does not mean he was acting outside of the scope of his employment at the time of his accident.

Nor may defendants avail themselves of the recalcitrant worker defense. Defendants would have to raise issues of fact whether plaintiff refused to use safety devices that the owner or contractor provided. *see Balthazar v Full Circle Constr. Corp.,* 268 AD2d 96, 99 [1st Dept 2000]; *Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 63 [1st Dept 1999]. This is not a case where the worker received specific instructions to use a safety device, but disobeyed or disregarded those instructions. *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]. The evidence that there was a safety device somewhere on the job site or that plaintiff failed to heed a general instruction he was given at some point in the past, does not defeat plaintiff's motion. *Crespo,* 294 AD2d at 147; *see also Morrison v City of New York,* 306 AD2d 86,

86 [1st Dept 2003]; *Davis v Board of Trustees of Hicksville Pub. Lib. of Hicksville Union Free School Dist.,* 240 AD2d 461, 463 [2d Dept 1997].

Plaintiff's motion papers include some photographs of where he fell. Defendants argue the photos, which were taken only hours after the accident, show features inconsistent with plaintiff's account of what happened. For instance, the 2x4 that plaintiff was using could not have landed where it did had plaintiff been actually standing where he claims he was when he fell. The photos, however, show a number of planks, many which appear to be the same size as the board plaintiff claims he used, and defendants have presented no explanation how they can differentiate between the board so as to specifically identify the one plaintiff was using, let alone pinpoint where it landed. These arguments are based upon conjectures and do not raise factual issues for trial.

That the accident alleged was unwitnessed presents no bar to summary judgment in favor of plaintiff. Where, as here, there is no substantiated challenge to credibility, plaintiff's motion will be granted (*Klein v City of New York,* 89 NY2d 833, 834-835 [1996]; *Franco v Jemal,* 280 AD2d 409 , 410 [1st Dept 2001]). Plaintiff is, therefore, entitled to summary judgment on Labor Law 240 § (1).

Plaintiff also moves pursuant to Labor Law § 241 (6), a claim which must be based on the violation of a specific regulation (*see Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 502 [1993]). Plaintiff cites to 12 NYCRR 23-5.1 (j) and 12 NYCRR 23-1.15, but makes no other references to these regulations. 12 NYCRR 23-5.1 (j) provides that scaffolds must have safety railings, but it excepts certain scaffolds, such

as "ladder jack scaffold platforms." Plaintiff says that he fell off a ladder scaffold, so it is not clear if the regulation excepts that scaffold. 12 NYCRR 23-1.15, which sets standards for safety railings, does not apply to this case, because plaintiff was not provided with any such devices (*see Dzieran v 1800 Boston Road, LLC,* 25 AD3d 336, 337-338 [1st Dept 2006]). Since plaintiff has not proved his section 241 (6) claim, he is not entitled to summary judgment on that claim and his motion is denied.

Conclusion

Plaintiff has proved he is entitled to summary judgment on his Labor Law § 240 (1) claim and defendants have failed to raise factual issues that have to be decided at trial. Therefore, plaintiff's motion is granted on the issue of liability on his Labor Law § 240 (1) claims against the moving defendants. Plaintiff, however, has not proved his Labor Law § 241 (6) claims and his motion for summary judgment on that claim is denied as to the moving defendants.

In accordance with the foregoing,

It is hereby

ORDERED that the branch of plaintiff's motion for partial summary judgment as to liability on his Labor Law § 240 (1) claim against defendants Mega Contracting, Inc., Hancock Place Apartments Housing Development Fund Corporation, and Hancock Place Apartments Associates, L.P. is granted as to liability only, and this matter is to be set down for an immediate trial on the sole issue of plaintiff's damages; and it is further

ORDERED that the branch of plaintiff's motion for partial summary judgment as to liability on his Labor Law § 241 (6) claim against defendants Mega Contracting, Inc.,

Hancock Place Apartments Housing Development Fund Corporation, and Hancock Place Apartments Associates, L.P. is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that plaintiff shall serve a copy of this decision/order on the Office of Trial Support so that this case can be scheduled for trial.

Dated: New York, New York,
May 21, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.