[* 1]

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

PRESENT: **Hon. Marcy S. Friedman** PART 57

Justice

Index Number : 603853/2005
CONNOLLY, JOHN
VS.
PAYTON LANE NURSING HOME
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. 603853/05

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

n this motion to/for Summary Judgment

PAPERS NUMBERED
1, 2
2, 3
4

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

Answering Affidavits — Exhibits

Replying Affidavits Memo of Law M1

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER.

FILED
NOV 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/3/08

MARCY S. FRIEDMAN, J.S.C.

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

JOHN CONNOLLY,

Plaintiff, Index No.: 603853/05

- against -

PAYTON LANE NURSING HOME, INC., PAYTON LANE PROPERTIES, INC., FAIRCHILD REALTY GROUP, LTD., and FAIRCHILD PROPERTIES LTD., DECISION/ORDER

Defendants.

In this Labor Law action, plaintiff sues for injuries sustained when he fell off of a ladder while working at a construction site on January 19, 2005. Defendants Payton Lane Nursing Home, Inc. and Payton Lane Properties, Inc. (together "Payton Lane") move for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves for summary judgment on his Labor Law § 240(1) cause of action against defendant Payton Lane Nursing Home, Inc. on the issue of liability. Plaintiff does not move for summary judgment on his Labor Law §§ 200 and 241(6) claims and does not oppose the branch of defendants' motions for summary judgment dismissing those claims.

The following relevant facts are undisputed: Payton Lane Nursing Home, Inc. owned the premises known as Payton Lane Nursing Home. Plaintiff was employed as a carpenter by non-party E.W. Howell Co., Inc. ("E.W. Howell"), the general contractor on a construction project at

the nursing home. According to plaintiff, at the time of the accident, he was working on the roof of the building, within the parapet area. (Connolly's Dep. at 10.) Plaintiff was building a temporary roof over HVAC mechanical units which were positioned on the main rooftop of the building. (See id. at 11, 19.) The HVAC units were raised, set on top of and surrounded by an elevated catwalk, which stood about "five and a half to six feet" from the base of the roof. (Id. at 12, 18-19.) The catwalk floor was made out of metal grates (see id. at 20-21), weighing about 200 lbs per grate. (Dep. of Matthew Duffy [plaintiff's co-worker] at 34.) The catwalk did not cover the entire roof area, but rather extended to within three to three and a half feet from the parapet walls. (Connolly Dep. at 19.)

Plaintiff testified that as of the time of the accident, about "40 percent of the grates" had been removed from parts of the floor of the catwalk and placed in stacks on other parts of the floor of the catwalk. (Id. at 21.) This condition created "holes in the grating where the gratings were removed" which were about "five to six" feet deep. (Id. at 39-40.) According to plaintiff, the grates were already in this removed and stacked condition before he began working at the site because mechanical contractors, who were also working on the roof, needed to gain access to the duct work underneath the HVAC units. (See id. at 21.) Plaintiff testified that, prior to the date of the accident, he complained to his foreman "about the conditions that we were working under," stating that he "could hardly move around between the duct work being stacked there and planking stacked and material being stacked there." (Id. at 24.)[1] Matthew Duffy, plaintiff's co-worker, also testified that the duct work was "everywhere," including "on the catwalk." (Duffy

[1]Plaintiff testified that when he mentioned steel planks or steel grates throughout his deposition, he was referring to the same object, that being the steel grates that were removed from the catwalk. (Connolly Dep. at 44-45.)

Dep. at 37.)

At the time of the accident, plaintiff was on the catwalk and was passing tarps up to laborers that were on top of the temporary roof framing above one of the HVAC units. (See Connolly Dep. at 30.) Plaintiff testified that he "couldn't reach it from the metal grating so [he] had to get elevation to get up". (Id. at 36.) In order to get such elevation, plaintiff used a six-foot A-frame ladder in which he climbed two-thirds of the way up to pass the tarps. (See id. at 34, 38.) The ladder was positioned on top of a pile of the stacked grating "between 24 and 30 inches" high on top of the floor of the catwalk. (Id. at 45.) As plaintiff testified, "[t]here was no way [he] could get the ladder to open up" so he "had to prop it up against one of the [HVAC] units" because it "was the only way [he] could get the ladder situated." (Id. at 40.) Plaintiff further testified that there was "[p]robably six inches" of exposed grating from the edge of the bottom of the ladder to the back of the grating on which the ladder was placed. (Id. at 63.) As plaintiff descended the ladder, while his right foot was still planted on the bottom rung, he stepped off with his left foot intending to step on to the stack of grating on which the ladder stood. (See id. at 61.) However, plaintiff's "left foot lost its footing" and he slipped off the edge of the stacked grating and onto the catwalk, landing on his left leg. (See id. at 39, 61-64.) "Behind [him] there were openings in the grating, so to avoid falling down another five to six feet, [he] threw his body to the right" and sustained injuries which are the subject of this lawsuit. (Id. at 39.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d

557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

Labor Law § 240 (1) provides:

> 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves." (Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) "Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury." (Gordon, 82 NY2d at 559.)

It is well settled that "failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)." (Hernandez v Bethel United Methodist Church, 49 AD3d 251, 252 [1st Dept 2008] [internal quotation marks and citation omitted]. Accord Kosavick v Tishman Constr. Corp., 50 AD3d 287 [1st Dept 2008]; Peralta v American Tel. & Telegraph Co., 29 AD3d 493 [1st Dept 2006]; Montalvo v J. Petrocelli Constr., Inc., 8 AD3d 173 [1st Dept 2004]; Wise v 141 McDonald Ave., LLC, 297 AD2d 515 [1st

Dept 2002]; Jamil v Concourse Enters., Inc., 293 AD2d 271 [1st Dept 2002].)

Even if a ladder is not defective, a claim under § 240(1) will prevail where the ladder was not "'erected' or 'placed'...in such a manner, or with such safeguards, as necessary to provide plaintiff with 'proper protection.'" (Bland v Manocherian, 66 NY2d 452, 460 [1985].) Thus, where the conditions at the work site required the ladder to be placed in such a manner that it did not provide proper protection from a fall, courts have found violations of § 240(1). (See Sztachanski v Morse Diesel Intl., 9 AD3d 457 [2d Dept 2004][defendants found liable to plaintiff under § 240[1] where he "had to use the A-frame ladder in the closed position to access that portion of the ceiling" as the walls were curved]; Pichardo v Aurora Contractors Inc., 29 AD3d 879 [2nd Dept 2006][where the "work could not be performed without separating the ladder into two sections" and such use of the ladder did not afford plaintiff proper protection, defendants were liable under § 240[1]]; Whalen v Exxonmobil Oil Corp., 50 AD3d 1553, 1554 [4th Dept 2008] lv denied 53 AD3d 1124 [2008] [finding a violation of § 240(1) where plaintiff leaned the ladder in its closed position against a door and fell when the door swung open].)

However, proof of a fall from a ladder does not, by itself, establish liability under § 240(1), unless there is also evidence that the fall was proximately caused by a violation of the statute (see Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280, 288-290 [2003]). Thus, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" under the statute. (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 39 [2004].) To defeat liability under Labor Law § 240(1), the defendant must establish that the "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had

he not made that choice he would not have been injured." (Cahill, 4 NY3d at 40. See Kosavick v Tishman Constr. Corp., 50 AD3d 287 [1st Dept 2008].) Once a plaintiff makes a prima facie showing "that the statute was violated and that the violation proximately caused his injury" (Cahill, 4 NY3d at 39), "[t]he burden then shifts to defendant to establish that 'there was no statutory violation and that plaintiff's own acts and omissions were the sole cause of the accident.'" (Kosavick, 50 AD3d at 288.)

On this record, plaintiff makes a prima facie showing of entitlement to summary judgment as to liability under § 240(1). While it is undisputed that the ladder was not defective, it is also undisputed that plaintiff positioned the ladder in the only available manner that would have allowed him to hand up materials to workers on the roof above. In particular, as summarized above, plaintiff testified without contradiction that the ladder not only had to be placed in a closed position against the wall of the HVAC unit, but that it had to be stood on a stack of grates with a surface below the foot of the ladder on which plaintiff could have stepped when descending, of only approximately six inches.[2] This evidence makes a prima facie showing that the ladder was not, and could not have been, properly placed so as to afford protection from a fall. (See Bland v Manocherian, 66 NY2d 452, supra; Whalen v Exxonmobil Oil Corp., 50 AD3d 1553, supra; Sztachanski v Morse Diesel Intl., 9 AD3d 457, supra.)

In opposition, defendants claim that plaintiff's accident was not caused by a violation of § 240(1) and that plaintiff himself was the sole proximate cause of the accident. However,

---

[2]While defendants do not argue that plaintiff was the sole proximate cause of his accident because he used the ladder in its closed position, the court notes that a plaintiff may still be entitled to summary judgment on its § 240(1) claim if the plaintiff puts forth sufficient evidence showing that, under the circumstances, there was no way to position the ladder other than in its closed position. (See Sztachanski v Morse Diesel Intl., 9 AD3d 457, supra.)

defendants' argument that plaintiff was not looking where he was going as he descended the ladder does not raise a triable issue of fact. Indeed their contention that plaintiff admitted so much is based on a misreading of his testimony. Plaintiff's testimony was that he was looking "straight" as opposed to watching his left foot as he stepped off. (Connolly Dep. at 45-46.) Plaintiff's act, at most, amounted to comparative negligence, which is not a defense to a § 240(1) claim. (See Velasco v Green-Wood Cemetery, 8 AD3d 88 [1st Dept 2004].)

To the extent that defendants claim that plaintiff should not have positioned the ladder on top of the stacked grating, this claim is made solely in defendants' attorneys' affirmations (Defendants' Memo. In Support at 13) which are without probative value. Defendants wholly fail to submit an affidavit or the testimony of anyone with personal knowledge of the accident showing that the ladder could have been placed anywhere else or in a manner that would have allowed plaintiff to safely perform his work. (Compare Meade v Rock-McGraw, Inc., 307 AD2d 156 [1st Dept 2003] [triable issue of fact raised as to defendant's sole proximate cause defense where plaintiff's supervisor testified that there was room for plaintiff to have opened the closed ladder from which he fell].)

Defendants further argue that plaintiff was recalcitrant because he chose not to use an available harness. However, defendants do not submit any evidence, other than mere conjecture by their attorneys, that a "harness could have been so placed and operated as to give proper protection" to plaintiff at the time of the accident. (Allen v New York City Transit Auth., 35 AD3d 231, 232 [1st Dept 2006].) On the contrary, plaintiff testified that was not wearing a safety harness at the time of the accident because he "was trained to use a harness when we were working up where there was no railing. Like up on the top of a roof where you could fall off the

side of a building. If you were out on ironwork at that point, I don't think they were required to wear one." (Connolly Dep. at 27.) Defendants make no showing by any witness with personal knowledge of the work site that a harness should have been used. Accordingly, on the above authority, defendants fail to raise a triable issue of fact on their recalcitrant worker defense. (See Kosavick, 50 AD3d 287, supra.)

Finally, contrary to defendants' argument, it is well settled that "the fact that plaintiff fell only a short distance [does not] remove this incident from the purview of the statute, since falling from the bottom rung of a ladder at a construction site is the type of elevation-related risk the statute was intended to cover." (Binetti v. MK West Street Co., 239 AD2d 214 [1st Dept 1997].)

Moreover, this is not a case in which plaintiff tripped on anything on the floor or "a separate hazard wholly unrelated to the danger that brought about the need for the ladder" but, rather, one in which the ladder, because of the manner in which it had to be positioned, failed to prevent plaintiff from falling. (Compare Nieves v Five Boro Air Conditioning & Refrig. Corp., 93 NY2d 914, 916 [1999]. Accord Cohen v Memorial Sloan-Kettering Cancer Center, __NY2d__, 2008 WL 4700793 [2008].) Therefore, defendants have not met their burden of producing sufficient evidence to withstand plaintiff's summary judgment motion.

Accordingly, it is hereby ORDERED that defendants' motion is granted to the extent of dismissing plaintiff's Labor Law §§ 200 and 241(6) claims; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is granted to the extent that plaintiff is awarded judgment as to liability against defendant Payton Lane Nursing Home, Inc. on his Labor Law § 240(1) cause of action; and it is further

ORDERED that an assessment on damages shall be held at the time of trial, or after any

other disposition of the underlying action, upon the filing of a note of issue and payment of the proper fees, if any; and it is further

ORDERED that, within 30 days from the date of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon the defendants, and all other parties or their attorneys, by ordinary first class mail, and shall file same, together with proof of service, with the Clerk of this Court and the Clerk of the Trial Support Office (Room 158).

This constitutes the decision and order of the court.

Dated: New York, New York
November 3, 2008

MARCY FRIEDMAN, J.S.C.