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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

ANTONI WILINSKI and HALINA WILINSKI,
Plaintiffs,

- v -

334 EAST 92ND HOUSING DEVELOPMENT FUND CORP., VISTA DEVELOPERS CORP., EAST 92ND STREET SENIOR HOUSING, L.P., FIRST & SECOND ASSOCIATES, LLC, ALLIANCE DEVELOPERS OF NY CORP., METROPOLITAN COUNCIL ON JEWISH POVERTY and EMPIRE DEVELOPERS CORP.,
Defendants.

Index No.: 117632/05
Motion Date: 10/07/08
Motion Seq. No.: 01
Motion Cal. No.: 122

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3, 4

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers,

Plaintiffs move for partial summary judgment on their Labor Law 240 (1) claim while the defendants cross-move for summary judgment dismissing the complaint.

This action arises out of an accident that occurred during demolition of a warehouse at defendants' premises on September 28, 2005. Plaintiff alleges that he was struck in the head by two pipes which became dislodged as a result of the demolition of

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

Check One: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

a nearby wall. The pipes which struck plaintiff rose out of the floor to a height of eight to ten feet above the floor on which plaintiff was working.

Plaintiff seeks summary judgment under Labor Law 240 (1) stating that the defendants' failure to provide proper safety devices to secure or otherwise protect plaintiff from the falling pipes constitutes a breach of the statutory duty. Plaintiff relies on the Second Department decision in Tylutki v Tishman Technologies (7 AD3d 696 [2d Dept 2004]). In Tylutki the Court stated that "[t]he accident occurred when the plaintiff's coworker hit a section of pipe with a hammer causing the pipe to fall striking the plaintiff in the face. It is undisputed that no protective device designed to catch the falling pieces of pipe was utilized in connection with the work." Id. The Court held that "[c]ontrary to the defendants' contention, the plaintiff was exposed to a gravity-related hazard within the meaning of Labor Law § 240 (1). Furthermore, the plaintiffs met their prima facie burden of entitlement to judgment as a matter of law by demonstrating that the absence of a safety device of the kind enumerated in the statute proximately caused the plaintiff's injury." Id. (citations omitted).

Defendants argue that plaintiffs' reliance upon Tylutki is misplaced because the pipes in that case were horizontal pipes that would fall when their brackets were removed in contrasts to

the pipes in this case which were vertical and therefore analogous to a wall. Under defendants' theory, the collapse of a wall during demolition of premises poses no elevation-related hazard within the meaning of the statute. See Peay v New York City School Const. Authority, 35 AD3d 566, 567-568 (2d Dept 2006) ("plaintiff failed to demonstrate that he fell from a height or that the height . . . was the proximate cause of his injuries. Furthermore, the wall that collapsed on the plaintiff was at the same level as his space and therefore was not a falling object for purposes of Labor Law §240 (1)."); Sabovic v State, 229 AD2d 586, 587 (2d Dept 1996) ("contrary to the claimant's contention, the wall which collapsed was at the same level as the work site and is not considered a falling object for purposes of Labor Law §240 (1) pertaining to risks created by differences in elevation"); Terry v Mutual Life Ins. Co. of New York, 265 AD2d 929 (4th Dept 1999)"[b]ecause the base of the wall was at the same elevation as plaintiff's worksite, the Labor Law § 240 (1) claim was properly dismissed").

The court finds defendants' argument misapplies the precedents cited based upon the facts presented here. Contrary to defendants' arguments, the Appellate Division opinion in Tylutki made no distinction between the "horizontal" nature of the accident-causing pipe referenced therein and in fact the term "horizontal" does not appear in the opinion. The difference in

the applicability of Labor Law 240 (1) in Tylutki versus the collapsing wall cases cited by defendant (Peay, Sabovic, Terry) is the Court's observation in Tylutki that the absence of elevation-related protective devices to catch the falling pipes brought the worker within the protection of the statute. There is no dispute that no "braces" or "ropes" as set forth in the statute were utilized in this case to prevent the pipes from falling even though the evidence shows that plaintiff questioned whether the pipes should be removed before the demolition began. This is in contrast to the collapsing wall cases where the walls could not be braced because the purpose and intent of the work was to cause the walls to fall as part of the demolition.

Therefore, the court shall grant plaintiff's motion for partial summary judgment on the Labor Law 240 (1) claim and deny defendants' respective cross-motion.

The court shall also deny defendants' cross-motion seeking summary judgment dismissing plaintiff's Labor Law 241 (6) claims. Industrial Code Sections (22 NYCRR) 23-3.3 (b) (3) which states that during demolition "parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration" and (22 NYCRR) 23-3.3 (c) which states that

> [d]uring hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls

> or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means"

are implicated by the facts presented here and provide sufficient predicate for Labor Law 241 (6) liability. See Gonzalez v Fortway LLC, 22 Misc3d 1115(A), 2009 NY Slip Op 50132(U) at 6 (Sup Ct, Kings County, Jan 27, 2009) (drainpipe that struck plaintiff was uncovered during ceiling demolition, evidence was that pipe was unsecured and presented a hazard and defendants failed to demonstrate that continuous inspections were carried out as required under 23-3.3[c])); Salinas v Barney Skanska Const. Co., 2 AD3d 619, 622 (2d Dept 2003) quoting Monroe v City of New York, 67 AD2d 89, 100 (2d Dept 1979) ("[t]he thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections', against hazards which are created by the progress of the demolition work itself").

Defendants' reliance upon Monroe and Campoverde v Bruckner Plaza Associates, L.P. (50 AD3d 836, 837 [2d Dept 2008]) is misplaced because in those cases the "hazard which injured the plaintiff was the actual performance of the demolition work, not structural instability caused by the progress of the demolition." In this case, there is no evidence that the pipes were being demolished at the time of the plaintiff's accident and therefore the hazardous condition of the pipes was created by the progress of the demolition itself.

Finally, defendants' motion for summary judgment dismissing the claims against certain defendants because they were neither owners or contractors is denied because of defendants' failure to present prima facie proof on this claim.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on plaintiffs' claim for liability under Labor Law 240 (1) is GRANTED and plaintiffs' damages on this claim shall be assessed at the time of trial; and it is further

ORDERED that defendants' cross-motion is DENIED in its entirety; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference before Part Mediation-1 on April 3, 2009 at 10:00 A.M. and provide the mediator with a copy of this Order, and if this action is not settled thereat, the parties are directed to attend a pre-trial conference on May 5, 2009, at 2:30 P.M., in IAS Part 59, Room 1254, 111 Centre Street, New York, New York 10013, to set a trial date.

This is the decision and order of the court.

Dated: March 16, 2009 ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C.