[* 1]

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

PRESENT: HON. PAUL WOOTEN Justice PART 7

BRIAN TURK,

Plaintiff,

- against -

CPS 1 REALTY LP, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and JANSONS ASSOCIATES INC.,

Defendants.

INDEX NO. 114805/2007

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 4, were read on this motion by plaintiff for partial summary judgment on the issue of liability as to the Labor Law §§ 240(1) and 241(6) claims, and cross-motion by defendants for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ■ Yes ☐ No

This is a personal injury action by plaintiff Brian Turk ("plaintiff") to recover damages for injuries he allegedly sustained while working as an elevator erector on a renovation project at the Plaza Hotel ("the Plaza"). The accident occurred when plaintiff stepped on a piece of plywood on the roof that was covering a three foot by three foot opening, which gave way and caused him to partially fall into the opening. Defendants CPS 1 Realty LP ("CPS1"), Tishman Construction Corporation of New York ("Tishman") and Jansons Associates Inc. ("Jansons") (collectively "defendants") are the Plaza's owner, construction manager and chimney contractor. Plaintiff commenced this action against defendants asserting claims under Labor Law §§ 200, 240(1) and 241(6). The parties completed discovery and a Note of Issue was filed

on August 24, 2009. Plaintiff now moves for partial summary judgment, pursuant to CPLR 3212, against defendants on the issue of liability with respect to his Labor Law §§ 240(1) and 241(6) claims. Defendants cross-move for summary judgment dismissing the causes of action under Labor Law §§ 240(1) and 241(6).

BACKGROUND

In support of his motion for partial summary judgment, plaintiff submits, *inter alia*, his own deposition and the depositions of Tishman employees Michael Pinelli and Jonathan Doshna, Jansons employee Terry Paddison, and non-party witnesses Thomas Maroti and Joseph Acetta. In opposition to the motion and in support of their cross-motion for summary judgment, defendants rely upon the same depositions submitted by plaintiff. The following relevant facts are undisputed.

On May 31, 2007, plaintiff was working as a union elevator erector on a renovation project at the Plaza located at 768 5th Avenue, New York, New York. The building was owned by CPS1. Tishman was the project's construction manager and was in charge of overseeing the project, overall safety at the site, and coordinating the various trades. Jansons was hired by Tishman as the chimney contractor and was responsible for installing fireplaces and their flues/vents, which required openings to be cut into the roof. Plaintiff was working under the employ of Transel Elevator, a subcontractor retained to install and modernize several elevators at the site.

As plaintiff was leaving the site at around 3:15 p.m., he received a call from his supervisor reporting that an elevator car was shut down. He was instructed to go upstairs to the security office to determine the cause of the problem. He proceeded to the security office and told Tishman's labor foreman about the call. The motor rooms for the elevators were located on the roof, and the foreman arranged to have an elevator operator bring plaintiff to the roof area via an external hoist.

Plaintiff arrived on the roof at around 3:30 p.m. He exited the hoist intending to walk to the motor room, which was straight ahead and a little to the right. He stepped onto a ramp that led to the roof, which was covered with plywood. He walked six to ten feet and stepped onto some plywood, which gave way. The plywood that he stepped on was covering an approximately three foot by three foot opening on the roof that had been cut by Jansons.

Plaintiff fell down on his left knee and reached out to hold himself over the opening. His left knee hit the side of the hole, which was the solid rooftop. His right arm hit the other side, which was the right side opening on the rooftop. His body reached a point where it was not falling or moving, and he was crunched up in a ball halfway in the hole. He believed that his right leg fell into the opening while he was holding himself up because that was "the only place it could have went" (Turk deposition at 142). His left leg did not enter the opening as it was smashed into the side of the hole and was what he used to keep from falling all the way through. At some point during the incident, he watched the wood flip over a couple of times and smash underneath him. After the accident, he was able to extricate himself out of the hole and was helped up by ironworkers who were working on the roof.

The accident was witnessed by Thomas Maroti, a foreman for the ironworkers employed by DCM Erectors. Maroti heard the outside hoist elevator come up to the roof and drop someone off. Plaintiff exited the elevator was walking one minute and then he "just disappeared" (Maroti deposition at 9). Maroti immediately knew that plaintiff had fallen into a hole because he had previously seen that occur on the site. He walked over to the area and saw plaintiff pulling himself out of the hole.

Maroti had observed the opening in the roof many times. He described it as a three foot by three foot chimney hole that had a drop down to the level below that was approximately twelve to fifteen feet. There was plywood in the area covering the hole somewhere along the line. Maroti never saw the plywood secured or nailed down, and it was just placed over the

hole. The plywood did not have any markings.

Maroti believed that the proper way to secure the openings on the roof was by either nailing down plywood over the hole or using cleats to ensure that the plywood was securely fastened, which was not done at the Plaza site. On the date of plaintiff's accident, Maroti had complained about the same hole to the safety supervisor, Joseph Acetta. He was concerned about that particular hole because it was in a direct path between the elevator, the outside hoist and the roof. There were, however, other pathways to use when someone exited the elevator other than passing over that hole.

Jansons employee Terry Paddison was on the roof three or four times during the week of the accident, and had observed about twenty openings on the roof. The openings were covered with plywood that was supposed to be secured but Paddison did not know if it was. Besides the plywood, the openings were protected with a concrete curb around them that was six inches high by six inches wide. The twenty openings were located sporadically on the roof but were not in any of the passageways where the workers were required to walk.

DISCUSSION

Plaintiff moves for partial summary judgment on the issue of liability with respect to the causes of action under Labor Law §§ 240(1) and 241(6). Defendants oppose plaintiff's motion and cross-move for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims. The motion and cross-motion are decided as follows.

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of

material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

B. Labor Law § 240(1)

Plaintiff argues that he is entitled to partial summary judgment on the issue of liability, as a matter of law, because the failure to properly secure an opening that covered a three foot by three foot hole on the roof constitutes a prima facie violation of Labor Law § 240(1). Defendants argue that the motion should be denied because there is a question of fact as to whether any part of plaintiff's body actually fell into the hole, thus precluding summary judgment. Defendants also cross-move for summary judgment dismissing the section 240(1) claim on the basis that plaintiff's own action in choosing to step on the plywood rather than to walk around it using other pathways was the sole proximate cause of his alleged injuries.

Labor Law § 240(1), known as the "scaffold" law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that

occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).[1] The statute provides in pertinent 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."

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff's actions were the sole proximate cause of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross*, 81 NY2d at 501). In *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], however, the Court of Appeals clarified that the dispositive inquiry does

---

[1]Defendants raise no challenge to the applicability of the Labor Law to Tishman on the basis that Tishman was not a "contractor." In any event, the record establishes Tishman's contractor status for Labor Law purposes, and Tishman would still be subject to the statute as CPS1's agent (*see e.g. Williams v Dover Home Improvement, Inc.*, 276 AD2d 626, 626 [2d Dept 2000]).

not depend upon whether the injury resulted from a "falling worker" or "falling object." According to *Runner*, "the governing rule is . . . that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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*'" (*id.* [quoting *Ross*, 81 NY2d at 501] [emphasis in original]).

Here, plaintiff contends that he has set forth a prima facie violation of section 240(1) because the undisputed evidence establishes that he was walking on the roof when the unsecured plywood collapsed, causing part of his body to fall through the opening. He argues that the fact that he did not fall entirely through the opening to the level below is of no consequence. Defendants claim that there is an issue of fact because plaintiff's testimony was equivocal as to whether any portion of his body actually fell into the hole.

The Court finds that plaintiff has established a prima facie violation of Labor Law § 240(1). The undisputed evidence demonstrates that, while walking on the roof at the direction of his supervisor, plaintiff stepped on a piece of plywood covering a three foot by three foot opening, and a portion of his body fell through the opening when the plywood gave way. Such a fall through an opening on the roof is the type of elevation-related risk to which section 240(1) applies (*see O'Connor v Lincoln Metrocenter Partners, L.P.*, 266 AD2d 60, 61 [1st Dept 1999] [plaintiff who was crossing 19th floor from elevator and fell chest deep into three foot by four foot opening in floor when plywood that had been placed over it gave way was engaged in work involving a gravity-related risk that came within the protection of section 240(1)]; *Dalaba v City of Schenectady*, 61 AD3d 1151, 1152 [3d Dept 2009] ["Plaintiff's fall through an opening in the roof while engaged in the construction of a new building is precisely the type of elevation-related risk for which Labor Law § 240(1) was designed to provide protection."].

It is further uncontested that the plywood was unmarked and unsecured since it was not

nailed down. No safety device was provided to prevent plaintiff's fall, and plaintiff was able to avoid falling to the floor below only by holding himself up with his left leg and right arm. Indeed, to the extent that the opening was surrounded by a six by six inch concrete curb, such curb clearly failed to provide proper protection. Plaintiff has therefore sustained his initial burden of proving a prima facie violation of section 240(1) (*see Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 363 [1st Dept 2007] [plaintiff met prima facie burden on section 240(1) claim through "evidence that her decedent, who was engaged in renovating the property, fell through an open hole from an unsecured piece of plywood that had been laid over the beams when the platform shifted, and that no safety device was provided to prevent his fall"); *Becerra v City of New York*, 261 AD2d 188, 190 [1st Dept 1999] [collapse of unsecured makeshift plywood floor that created an opening into which plaintiff fell to the level of his shoulders constituted a prima facie violation of section 240(1)]; *O'Connor*, 266 AD2d at 60-61).

In opposition to this prima facie showing, defendants have failed to raise any triable issues of fact (*see Figueiredo*, 39 AD3d at 363). Their argument that the evidence was equivocal regarding whether plaintiff actually fell into the opening lacks merit. Plaintiff's Labor Law claim is based upon an allegation that he *partially* fell into the hole, which is supported by his testimony that his right leg had to be in the hole since his left leg was smashed into the side of the hole and was what he used to keep from falling all the way through.

Moreover, a partial fall through an opening on a roof provides a sufficient basis to support a violation of section 240(1) (*see Becerra*, 261 AD2d at 190 ["It is well established that a partial fall through a hole caused by shifting boards of a scaffold is covered by Labor Law § 240(1)]; *Carpio v Tishman Const. Corp.*, 240 AD2d 234, 236 [1st Dept 1997] ["Plaintiff's partial fall through a hole at a construction site can hardly be characterized as only tangentially related to the effects of gravity."]).

Defendants' argument in their cross-motion that plaintiff was the sole proximate cause of

the accident also fails to raise an issue of fact. The gravamen of defendants' argument is that plaintiff was the sole proximate cause of the accident because he could have walked around the opening via other pathways, but purportedly took it upon himself to traverse an area outside of where the workers were supposed to walk. This contention that plaintiff was, in effect, a "recalcitrant worker" is unsupported by the evidence (*see Kosavick*, 50 AD3d at 288). There is no indication that plaintiff was instructed to avoid the area where the accident occurred and that he walked there in contravention of such a warning, or that he was even aware of the existence of the opening (*see Moniusko v Chatham Green, Inc.*, 24 AD3d 638, 638 [2d Dept 2005] ["Contrary to the defendant's contention, there was no evidence that the plaintiff was recalcitrant in the sense that he deliberately refused to use the available safety harness"]; *Geca v Best Roofing of New Jersey, Inc.*, 2007 WL 1113084, *2 [Queens Co. 2007] [there was no specific evidence that plaintiff who fell through skylight hole in roof that was covered with insulation was warned to avoid area where he fell and that he refused to heed such warning); *cf. Lupo v PRO Foods, LLC*, 68 AD3d 607, 607 [1st Dept 2009] [plaintiff's fall occurred at a place where he had not been working and did not need to be in order to perform his task, and he acknowledged that he had been aware of the presence of the hole since he began work at the site).

Since plaintiff has prima facie established that his partial fall through the opening on the roof constituted a violation of the statute and proximately caused his injuries, and defendants have failed to raise an issue of fact, plaintiff is entitled to judgment as a matter of law on liability (*see Becerra*, 261 AD2d at 190; *O'Connor*, 266 AD2d at 60-61). Accordingly, plaintiff's motion for partial summary judgment on the issue of liability with respect to his claim under Labor Law § 240(1) is granted, and defendants' cross-motion for summary judgment dismissing the claim under Labor Law § 240(1) is denied.

C. Labor Law § 241(6)

Plaintiff also moves for summary judgment on the issue of liability with respect to his

Labor Law § 241(6) claim, which he predicates upon an alleged violation of 12 NYCRR 23-1.7(b)(1)(i). In opposition and in support of their cross-motion for summary judgment dismissing the Labor Law § 241(6) cause of action, defendants again argue that plaintiff was the sole proximate cause of the accident since he could have utilized other pathways.

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). Liability may be imposed even where the owner or contractor did not supervise or control the worksite (*see id.*).

To support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a rule or regulation of the Commissioner of the Department of Labor ("Industrial Code") that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principals (*see Ross*, 81 NY2d at 502-04; *Cammon v City of New* York, 21 AD3d 196, 198 [1st Dept 2005]). A violation of the Industrial Code, once proven, does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]). "Thus, once it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff's injury" (*Rizzuto*, 91 NY2d at 350). If proven, the owner or contractor is vicariously liable without regard to his or her fault (*see id.*). The owner or contractor "may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*id.; see also Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 261 [1st Dept 2004]).

Plaintiff predicates his Labor Law § 241(6) claim upon an alleged violation of 12 NYCRR

23-1.7(b)(1)(i), which provides: "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)." This regulation has been found to be sufficiently concrete in its specification to support a section 241(6) claim (*see Olsen v James Miller Marine Serv.*, Inc., 16 AD3d 169, 171 [1st Dept 2005]).

Moreover, plaintiff has submitted sufficient evidence to prima facie establish a viable Labor Law § 241(6) claim predicated upon a violation of 12 NYCRR 23-1.7(b)(1)(i). The undisputed evidence establishes that the plywood covering the opening on the roof through which plaintiff partially fell was not nailed down, fastened or otherwise secured (*see Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]). Although comparative negligence may be raised as a defense to a section 241(6) claim, for the reasons stated previously, defendants have failed to raise an issue of fact based on their contention that plaintiff could have taken an alternate pathway (*see id.*; *Keena v Gucci Shops, Inc.*, 300 AD2d 82, 83 [1st Dept 2002]).

As noted, where a violation of the Industrial Code is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and thereby reserves, "for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto*, 91 NY2d at 351).

Accordingly, plaintiff's motion for partial summary judgment is granted to the extent that plaintiff has established a viable claim under Labor Law § 241(6) predicated upon a violation of 12 NYCRR 23-1.7(b)(1)(i). Defendants' cross-motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is denied.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for partial summary judgment is: (1) granted on the issue of liability as to the Labor Law § 240(1) claim; and granted as to the Labor Law § 241(6)

claim to the extent that plaintiff has a viable claim predicated on a violation of 12 NYCRR 23-1.7(b)(1)(i); and it is further,

ORDERED that defendants' cross-motion for motion for summary judgment is denied in its entirety; 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 order, with notice of entry, upon defendants.

This constitutes the Decision and Order of the Court.

Dated: ~~March~~ April 19, 2010

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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