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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ALONSO ESPINOZA,

Plaintiff,

-against-

NY-1095 AVENUE OF THE AMERICAS, LLC., EQUITY OFFICE PROPERTIES TRUST, TISHMAN CONSTRUCTION CORP. and GARDINER & THEOBALD, INC.,

Defendants.

INDEX NO. 103315/2007

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

LUIS MARTE,

Plaintiff,

-against-

NY-1095 AVENUE OF THE AMERICAS, LLC., TISHMAN INTERIORS CORPORATION, PAR PLUMBING CO., INC., REGIONAL SCAFFOLDING & HOISTING CO., INC., REGIONAL SCAFFOLDING/ SAFEWAY ENVIRONMENTAL NY JOINT VENTURE, LLC, and 1095 AVENUE OF THE AMERICAS CONDOMINIUM,

Defendants.

INDEX NO. 13062/2007

The following papers, numbered 1 to 2 were read on this motion by plaintiff(s) for summary judgement on liability.

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

Cross-Motion: ☐ Yes ■ No

These are actions to recover damages for personal injuries sustained by asbestos handlers when they fell from a scaffold while working at a construction site located at 1095 Avenue of the Americas, New York, New York (the building) on September 28, 2006.

Plaintiff Alonso Espinoza moves, pursuant to CPLR § 3212, for partial summary judgment in his favor on his Labor Law § 240 (1) claim against defendants NY-1095 Avenue of the Americas, LLC (NY-1095) and Equity Office Properties Trust (Equity) (together, defendants).

BACKGROUND

The building where the accident occurred was owned by defendant NY-1095. Defendant Equity was the parent company of NY-1095 and the property manager for the building. Defendant NY-1095 hired non-party PAL Environmental (PAL), pursuant to contract, to perform asbestos abatement work at the building. Plaintiff was employed by PAL as an asbestos handler.

On the date of the accident, plaintiff and his co-worker, Luis Marte (Marte) were performing asbestos removal work on the ceiling of the 16th floor of the building. The 16th floor was a containment area which was covered in plastic. As instructed by their foreman, plaintiff and Marte were utilizing a 12 foot to 16 foot-high scaffold, which was equipped with a work platform at the top. The scaffold did not contain any safety railings, nor was it tied to anything to prevent it from falling over. In addition, there were no safety lines in place, and the two men were not equipped with any safety harnesses. Toward the end of the work day, as plaintiff and Marte were cleaning off the top of the scaffold's platform, the scaffold collapsed into itself and they fell to the floor, sustaining injuries.

Plaintiff testified that, when he reached the 16th floor of the building on the day of the accident, there were already a number of already erected scaffolds in place. Plaintiff explained that he climbed up one side of the metal scaffold while Marte climbed up the other side. Prior to climbing up the scaffold, the men looked at the scaffold and shook it to make sure that it was

properly stable. Plaintiff noticed that the scaffold's brakes were a bit rusted and worn down. When he notified his foreman of this problem, the foreman advised him that there were no other scaffolds available for use. During the day's work, the scaffold was moved about four times, during which plaintiff never noticed anything wrong with the scaffold.

Plaintiff further testified that, as he was sweeping the scaffold on one side, and Marte was cleaning on the other side, "[t]he entire metal [scaffold] came down along with us" (Plaintiff's Notice of Motion, Exhibit C, Espinoza Deposition, at 79). In addition, plaintiff further explained that "the entire scaffold came apart, it gave way" (*id.* at 95).

Marte testified that the scaffold was actually two scaffolds, one on top of the other. The wheels of the scaffold were locked at the time of the accident, though the scaffold, which did not have railings, was not tied to anything. Marte also stated that he and plaintiff would climb up on opposite sides of the scaffold. At the time of the accident, after a foreman instructed them to stop work and clean the platform, the foreman passed a hose to plaintiff who eventually passed it back to him. At this point, Marte heard something that sounded like loose metal right before the scaffold disassembled and collapsed, causing him and plaintiff to fall down along with the scaffold.

In his affidavit, non-party witness Manuel Tuapante (Tuapante) stated that he was employed by PAL and present at the subject site on the day of the accident. Tuapante maintained that, at the time of the accident, plaintiff and Marte were standing on the same side of the scaffold and were about to climb down. Tuapante opined that this caused the scaffold to lose its balance and fall forward.

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 New York University 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 New York*, 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 issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF'S LABOR LAW § 240 (1) CLAIM AGAINST DEFENDANTS

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 Company*, 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 Company*, 239 AD2d 214, 214-215 [1st Dept

1997]; *see Ross v Curtis-Palmer Hydro-Electric Company*, 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]). "The statute is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted])" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]).

Labor Law § 240 (1) requires that persons working at an elevation be provided with appropriate safety equipment to secure them from falling (*Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999] [defendant liable under Labor Law § 240 (1) for failure to provide other safety devices, such as a safety belt, to a worker who fell from an unsecured ladder]). "[W]here the uncontroverted evidence establishes that the safety device collapsed, slipped or otherwise failed to support him or her, the plaintiff demonstrates a prima facie entitlement to partial summary judgment under Labor Law § 240 (1), and the burden shifts to the defendant" (*Ball v Cascade Tissue Group-New York, Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]). "[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Construction Corporation*, 44 AD3d 377, 381 [1st Dept 2007], *affd* 11 NY3d 757 [2008], quoting *Blake v Neighborhood Housing Services of New York City*, 1 NY3d at 289). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]).

Here, as the scaffold at issue collapsed, and was thus inadequately secured so as to protect plaintiff while subject to an elevation-related risk, and as no other safety devices were provided to him, defendants are vicariously liable for his injuries under Labor Law § 240 (1) (*see*

Peralta v American Telephone and Telegraph Company, 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 Corporation*, 18 AD3d 598, 598 [2d Dept 2005]).

The collapse or malfunction of a safety device for no apparent reason creates a presumption in plaintiff's favor that the device was not good enough to provide proper protection (*Blake v Neighborhood Housing Services of New York City*, 1 NY3d at 289 n 8; *see Panek v County of Albany*, 99 NY2d 452, 458 [2003] [summary judgment appropriate to plaintiff where it was uncontroverted that a ladder collapsed beneath plaintiff, causing him to fall]; *Loreto v 376 St. Johns Condominium, Inc.*, 15 AD3d 454, 455 [2d Dept 2005] [where 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 a violation of Labor Law § 240 (1)]; *Cosban v New York City Transit Authority*, 227 AD2d 160, 161 [1st Dept 1996]; *Aragon v 233 West 21st Street*, 201 AD2d 353, 354 [1st Dept 1994]).

Defendants maintain that they are not liable for plaintiff's injuries under Labor Law § 240 (1), because plaintiff was the sole proximate cause of his injuries. To this effect, defendants argue that plaintiff was negligent in that, at the time the scaffold collapsed, plaintiff and Marte were positioned on the same side of the scaffold as they were about to descend it, even though plaintiff testified that he knew that this could cause the scaffold to tip over.

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 Corporation, 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]; *Blake v Neighborhood Housing Services of New York City, Inc.*, 1 NY3d at 290).

However, in such a case as here, 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]; *Jamison v GSL Enterprises, Inc.*, 274 AD2d 356, 361 [1st Dept 2000]).

Here, defendants' evidence does not raise an issue of fact as to whether the scaffold possessed a ladder or a protective rail in the area where the ladder should have been (*Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 565 [1st Dept 2008]). As such, there is no issue of fact as to whether the insufficiency in the provided protective devices constituted a proximate cause of plaintiff's accident (*Vergara v SS 133 West 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005] [plaintiffs made a prima facie showing that plaintiff was not provided with the adequate protection required where there was no dispute that the six-foot high manually propelled scaffold had no side rails and no other protective device was provided to plaintiff]).

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]; *Ranieri v Holt Construction Corporation*, 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]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006];

Orellano v 29 East 37th Street Realty Corporation, 292 AD2d 289, 291 [1st Dept 2002]).

In addition, "the fact that the parties offered different versions of plaintiff's accident makes no difference with respect to defendants' liability under Labor Law § 240 (1)," as under either version, defendants have failed to properly protect plaintiff from an elevation-related risk (*John v Baharestani*, 281 AD2d at 118; *Orellano v 29 East 37th Street Realty Corporation*, 292 AD2d at 290 [discrepancies in plaintiff's description of how or why he fell off the ladder were irrelevant since there was no dispute that his injuries were caused by his fall]; *Schultze v 585 West 214th Street Owners Corporation*, 228 AD2d 381, 381 [1st Dept 1996]). As such, "[a] lack of certainty as to exactly what preceded plaintiff's [accident] does not create a material issue of fact here as to proximate cause" (*Vergara v SS 133 West 21, LLC*, 21 AD3d t 280 [where either defective or inadequate protective devices constituted the proximate cause of plaintiff's accident, it did not matter whether plaintiff's fall was the result of the scaffold tipping over or whether it was the result of plaintiff misstepping off its side]).

"Moreover, in light of the failure to provide plaintiff with any safety device to protect him against the risk of falling, 'the only inference to be drawn from the evidence is that a failure to provide appropriate protective devices is the proximate cause of the plaintiff's injuries'" (*Gontarzewski v City of New York*, 257 AD2d 394, 395 [1st Dept 1999], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 524 [1985]).

Further, it was foreseeable that plaintiff and his co-worker would, at some point, find it necessary to be on the same side of the scaffold while performing their work (*see Nimirovski v Vornado Realty Trust Company*, 29 AD3d 762, 762-763 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]; *Bush v Goodyear Tire & Rubber Company*, 9 AD3d 252, 253 [1st Dept 2004]).

Further, 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, Inc.*, 306 AD2d 128, 128-129 [1st Dept 2003]; *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]).

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

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that plaintiff Alonso Espinoza's motion, pursuant to CPLR § 3212, for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendants NY-1095 Avenue of the Americas, LLC and Equity Office Properties Trust is granted with the determination of the amount of damages to await trial; and it is further

ORDERED that the remainder of the action shall continue.

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: August 17, 2010

Enter:

PAUL WOOTEN J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

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