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

PRESENT: MARCY S. FRIEDMAN Justice PART

Index Number : 114989/2007
SULLIVAN, BRIAN
VS.
MIDTOWN WEST
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 114989/07
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

P 9/23/10 EC

this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3
memorandum of law	M1

Cross-Motion: ☐ Yes ☑ No

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

FILED
SEP 23 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

NYS SUPREME COURT
RECEIVED
SEP 23 2010
MOTION SUPPORT OFFICE

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

Dated: 9-15-10

MARCY S. FRIEDMAN 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

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BRIAN SULLIVAN and ELIZABETH SULLIVAN,

Plaintiffs,

Index No: 114989/07

-against-

MIDTOWN WEST A LLC and ROCKROSE GC MWA LLC,

Defendants.

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In this Labor Law action plaintiff Brian Sullivan was injured when he fell through a plywood deck at a construction site at 453 West 37th Street, New York, New York. Plaintiff moves for summary judgment, pursuant to Labor Law §240(1), against defendants Midtown West A LLC and Rockrose GC MWA LLC.

The facts of this case are largely undisputed: Plaintiff was employed by Rebar Lathing Corporation ("Rebar") as a deputy ironworker foreman. (P.'s Dep. at 6 [Exhibit 3 to P.'s Motion].) Rockrose GC MWA LLC ("Rockrose") was the general contractor for the building that was being constructed, and Midtown West A LLC ("Midtown West") was the owner. Rebar was the rebar subcontractor for the project.

Plaintiff's accident occurred on October 23, 2007 while he was working at the construction site. (See P.'s Dep. at 32-33.) Prior to the accident, plaintiff was working on the second floor, supervising the fabrication and installation of beams and columns. (Id. at 33.) Before leaving the work site for the day, plaintiff walked across a plywood deck to retrieve his backpack. As he did so, he heard a crack, and fell 30 feet to the ground. (Id. at 40-41.)

001

Plaintiff argues that defendants are liable for violation of Labor Law § 240(1) because plaintiff was a contractor working on an elevated temporary platform and was injured as a result of the collapse of the platform. (See P.'s Memo. of Law at 11.) Defendants argue in opposition that the protections of §240(1) do not apply because the platform from which plaintiff fell was not intended for a construction worker to work or stand on (Defs.' Aff. in Opp., ¶¶ 5, 29), and plaintiff had "no work-related purpose to be at that location." (Id. at ¶ 25.) Defendants claim that it was therefore not foreseeable that a worker would fall through the platform.

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, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, 513 [1991].) Thus, §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.) "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (Rocovich, 78 NY2d at 514.) "[A]n accident alone does not establish a Labor Law §240(1) violation or causation." (Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280, 289 [2003].) In order to establish liability under §240(1), it must be shown that the statute was violated and that the violation was a contributing cause of the plaintiff's fall. (Id. at 287-289.)

Plaintiff makes a prima facie showing of defendants' § 240(1) liability, as it is undisputed that he fell through a temporary floor at a construction site. It is well settled that a fall through a temporary floor at a construction site is a gravity related risk covered by § 240(1). (E.g. Gomez v 2355 Eighth Ave., LLC, 45 AD3d 493 [1st Dept 2007]; Becerra v City of New York, 261 AD2d 188, 189 [1st Dept 1999]; Robertti v Chang, 227 AD2d 542, 543 [2d Dept 1996], lv dismissed 88 NY2d 1064. See Jones v 414 Equities LLC, 57 AD3d 65, 74 n3 [1st Dept 2008] [noting in dictum that "[i]t is well established that a fall precipitated by the collapse of a temporary floor or similar structure gives rise to liability under § 240[1]."].)

In opposing plaintiff's summary judgment motion, defendant relies on authority holding that in order to establish liability under § 240(1), the plaintiff must demonstrate that risk of injury from the defendant's conduct was foreseeable. (See e.g. Gordon, 82 NY2d at 562; Espinosa v Azure Holdings II, LP, 58 AD3d 287, 291 [1st Dept 2008]; Jones, 57 AD3d at 75.) However, where a temporary floor is involved, it serves "conceptually and functionally, as an elevated platform or scaffold" (Becerra, 261 AD2d at 189), and the Appellate Division has not

required an additional showing of the foreseeability of an elevation-related injury from collapse. (See authorities cited supra at 3.)

Defendant's argument that plaintiff had no reason to work on the part of the temporary platform which collapsed is based solely on the affidavit of Peter DePalma, defendant's construction superintendent for the project. Mr. DePalma's claim that "there was no reason to work in that area" (DePalma Aff., ¶ 9) is not only wholly conclusory but is also inconsistent with his deposition in which he did not distinguish between different parts of the platform at issue. Rather, he repeatedly testified without qualification that the platform was a working surface that allowed workers to perform tasks at an elevation. (DePalma Dep. at 11-15.) He also testified that workers walked on and traversed the platform (id. at 15), and that it was used to store materials. (Id. at 14-15.) Notably, Mr. DePalma's affidavit does not state, and the record does not otherwise contain any evidence, that the area of the platform behind the column where plaintiff fell was roped off or separated in any manner from working areas, or that there was any warning that it was unsecured. Under settled authority, summary judgment may not be avoided based on an affidavit that is inconsistent with a witness' prior deposition testimony and is tailored to raise a triable issue of fact. (Naposki v Au Bar, 271 AD2d 371 [1st Dept 2000]; Nicholas v New York City Housing Authority, 65 AD3d 925 [1st Dept 2009].) Mr. DePalma's affidavit is therefore insufficient to raise a triable issue of fact.

To the extent that defendants suggest that they are not liable under § 240(1) because plaintiff's accident occurred after his workday was over (see Ds.' Aff. in Opp., ¶¶ 25, 27-28), this contention is without merit. The Court of Appeals has held that § 240(1) protection may attach even where the area of accident was not "the focus of [the plaintiff's] work at the time of the accident." (Hagins v State, 81 NY2d 921, 923 [1993].) The protection of § 240(1) has also

been held to apply where a plaintiff's accident occurred on a break in an area used for staging and storing equipment at the construction site. (See Morales v Spring Scaffolding Inc., 24 AD3d 42 [1st Dept 2005]. See also Kane v Coundorous, 293 AD2d 309 [1st Dept 2002] [§ 241[6] held applicable to passageway to construction site]; Fassett v Wegmans Food Mkts., Inc., 66 AD3d 1274, 1278 [3d Dept 2009] [§ 241[6] held applicable to passageway within construction site "to and from the points of actual work"].)

The court has considered defendants' remaining contentions and finds them to be without merit.

Accordingly, it is hereby ORDERED that plaintiff's motion for summary judgment is granted to the extent that plaintiff is partial summary judgment as to liability against defendants Midtown West A LLC and Rockrose GC MWA LLC on plaintiff's Labor Law § 240(1) claim, and an assessment of damages is directed; and it is further

ORDERED that a copy of this order with notice of entry shall be served upon the Clerk of the Trial Support Office (Room 158) who is directed, upon the filing of a note of issue and a statement of readiness, if not already filed, and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

This constitutes the decision and order of the court.

Dated: New York, New York
September 15, 2010

MARCY FRIEDMAN, J.S.C.