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

PRESENT: LOUIS B. YORK J.S.C. Justice PART 2

Jenkins

- v -

Plaza Construction

INDEX NO. 104799/08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 1/7/11

Louis B. York J.S.C.

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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LESTER JENKINS,

Plaintiff,

Index No.: 104799/08

- against -

PLAZA CONSTRUCTION CORP. and NEW YORK UNIVERSITY,

Defendants.

----------X

Louis B. York, J.:

In this personal injury action, plaintiff Lester Jenkins moves, pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment on the issue of liability under New York Labor Law § 240 (1) over defendants Plaza Construction Corp. (Plaza) and New York University (NYU) (third cause of action).

Defendants Plaza and NYU cross-move, pursuant to CPLR 3212, for an order granting them summary judgment dismissal of the complaint in its entirety on the ground that there are no triable issues of fact, as plaintiff was the sole proximate cause of his accident.

For the reasons set forth below, the motion is granted and the cross motion is granted in part and denied in part.

Background

At all relevant times herein, plaintiff, a glazier and glazier union member, was working in that capacity at 269 Mercer Street, New York, New York (the Premises). The Premises is owned

by NYU. NYU contracted with Plaza for a renovation project at the Premises. Plaza subcontracted with a number of trades, including Kosson Glass. Kosson Glass was to install the glass facades and "Kawneer" doors at the Premises. According to Dennis Doonan, job superintendent at Plaza, the window facades being installed by Kosson Glass at the time of the accident measured 14 feet in height and eight feet, two inches in width (Doonan Aff., ¶¶ 3-4).

Through his union, plaintiff was working for Kosson Glass on the NYU renovation project. Plaintiff's first day on the job was December 11, 2006. Plaintiff reported to work with his own tools. Kosson provided its workers with eight- to 10- foot ladders.

According to plaintiff and a fellow union member, non-party Brandon Savoca, who was also working on the site at that time, the ladders provided by Kosson were not high enough to perform some of the tasks needed to complete the installation. The men were directed to borrow equipment from another trade on the site. Two 20-foot wooden ladders were borrowed from the electric company working on site, Barth Electric. Plaintiff and Savoca worked with these ladders for the first four days plaintiff was working on the job site.

Plaintiff testified that he used the electricians' ladders at least five to six times. He testified that the ladders' feet

were in good condition, and that he did not notice any cracks, breaks, chips or imperfections in either of the two A-frame 20-foot ladders. Savoca testified to the same. Plaintiff also opened the ladders to make sure they worked and locked correctly.

Plaintiff testified that on December 14, 2006, plaintiff began working on a window that was in front of a large immovable dumpster. Plaintiff could not open the A-frame ladder with enough room to perform the work. Instead, plaintiff used the ladder in the closed position and leaned the ladder on a column between the two window openings. Savoca confirmed that in order to perform his duties, plaintiff had to use the 20-foot ladder leaning up against the wall.

Plaintiff ascended the ladder to remove screws from the top of the window. Plaintiff had removed about six or seven screws from the top opening. Right before the accident, plaintiff, who was having a difficult time removing one of the screws, tried to reach to get closer to it. Plaintiff reached as far to his right as he could to unscrew it. While he was attempting to unscrew the screw, he heard a crack, and the ladder started to shift, causing plaintiff to fall to the ground, injuring his wrist. After the fall, plaintiff observed that the leg on the ladder broke in two pieces.

Savoca also testified that he heard a cracking noise, and went to see what happened, at which time plaintiff told him that

he fell off the ladder and injured his wrist. Savoca observed that the leg of the ladder snapped in two pieces. Both men observed a laborer throw the ladder into a dumpster shortly after plaintiff fell.

Plaintiff claims that defendants failed to provide him with any safety equipment at the site, other than the defective ladder and other ladders that were too short for the work plaintiff was required to perform. Defendants claim that there was a scaffold available, relying on the affidavit of John Patrick, a foreman with Kosson. Savoca testified that there were no scaffolds to his knowledge at the time that he and plaintiff were working together, but that he did see the scaffolds subsequent to the accident. Further, according to both plaintiff and Savoca, a few days before the accident, they complained to another foreman, Lou, about the wooden ladder and were directed to use it. Doonan testified that Plaza did not provide scaffolds on site.

Discussion

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Once the moving party has made this showing, the burden is

on the opposing party to demonstrate "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*, 49 NY2d at 562). "If there is any doubt as to the existence of a triable issue, the motion should be denied" (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240 (1) is designed to protect employees on construction sites from elevation-related risks. The duty imposed by Labor Law § 240 (1) is non-delegable, and a contractor, owner, or their agent is liable for a violation of this section even where he exercises no supervision or control over the work (*Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 339 [2008]; *Collins v West 13th Street Owners Corp.*, 63 AD3d 621 [1st Dept 2009]). Moreover, Labor Law § 240 (1) is to be liberally construed so as to accomplish the purpose for which it was enacted, the protection of workers from such gravity-related accidents as falling from a height or being struck by a falling object which was improperly hoisted or secured (*Sanatass*, 10 NY3d at 339; *Misseritti v Mark IV Constr. Co., Inc.*, 86 NY2d 487, 491 [1995]; *Makarius v Port Authority of N.Y. & N.J.*, 76 AD3d 805 [1st Dept 2010]).

In order to prevail in a claim pursuant to Labor Law § 240 (1), a plaintiff must prove a violation of the statute, and that

the violation was a proximate cause of the accident (*see Torres v Monroe College*, 12 AD3d 261 [1st Dept 2004]). In this case, in order to defeat summary judgment, defendants must raise an issue of fact that plaintiff's actions were the sole proximate cause of his injuries (*Ranieri v Holt Constr. Corp.*, 33 AD3d 425 [1st Dept 2006]).

However, where, as here, the failure "to provide adequate safety devices against an elevation-related hazard, as required under Labor Law § 240 (1), [i]s a contributing cause of the [plaintiff's] injuries," the sole proximate cause defense is not applicable (*see Collado v City of New York*, 72 AD3d 458, 459 [1st Dept 2010], citing *Clarke v Morgan Contr. Corp.*, 60 AD3d 523, 523 [1st Dept 2009]; *Miglionico v Bovis Lend Lease, Inc.*, 47 AD3d 561, 564 [1st Dept 2008]).

Here, plaintiff asserts that he was provided with a faulty ladder, which caused him to fall and suffer injury. "[O]nce a plaintiff makes a prima facie showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device" (*Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287, 288 [1st Dept 2008]). The facts of this case establish that plaintiff has made this prima facie showing.

> "[T]o defeat summary judgment in this case based on violations of the Labor Law, defendant[s] would necessarily have to establish that 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'"

(*id.*, quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Defendants have failed to make such a showing. It is clear, based on the evidence submitted, that even if a scaffold was available, neither plaintiff nor his co-worker Savoca knew such a scaffold was available. Rather, plaintiff and Savoca both testified that they were directed by their supervisor to use the A-frame ladder after they had made complaints about it. Moreover, Savoca testified that he recollects that the scaffold was not available until after plaintiff was injured and stopped working at the site.

As such, plaintiff's motion for partial summary judgment on the issue of liability on the third cause of action over defendants is granted and the cross motion on this point is denied.

With respect to plaintiff's request for an immediate trial on damages, CPLR 3212 (c) provides that "[i]f it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages ..., the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or

before the court and a jury, whichever may be proper."

Defendants fail to oppose this aspect of the motion. As such, the motion is granted. However, defendants may, if so advised, engage in pretrial discovery as to plaintiff's damages, to be noticed within 30 days after service of a copy of this order with notice of entry.

Defendants also cross-move for summary judgment dismissal of those claims asserted under Labor Law § 241 (6) (fourth and fifth causes of action) on the grounds that plaintiff has not plead and cannot prove a specific violation of an applicable Industrial Code provision. A claim under Labor Law § 241 (6) must be based on violations of specific, applicable sections of the Industrial Code (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]; *Salsinha v Malcolm Pirnie, Inc.*, 76 AD3d 411 [1st Dept 2010]). The regulation must set forth a specific standard of conduct, as opposed to a general reiteration of common-law principles (*Quinlan v City of New York*, 293 AD3d 262 [1st Dept 2002]). Here, plaintiff's bill of particulars states that defendants violated the Board of Standards and Appeals, State of New York, Department of Labor, Industrial Code Part 23 (12 NYCRR 23), Sections 23-1.1, 23-1.2, 23-1.3, 23-1.4, 23- 1.5, 23-1.7 and 23-1.21. While most of the provisions recite general definitions, i.e., Sections 23-1.1, 23-1.2, 23-1.3, 23-1.4, and 23-1.5 (*see Nostrom v A.W. Chesteron Co.*, 59 AD3d 159, 169 [1st

Dept 2009] [affirming dismissal of Labor Law § 241 (6) based on 12 NYCRR 23-1.4 and 23-1.6), *affd* 15 NY3d 502 [2010]; *Williams v White Haven Mem. Park*, 227 AD2d 923 [4th Dept 1996] [holding that a plaintiff cannot support a section 241 (6) claim with 12 NYCRR subparts 23-1.3 and 23-1.5]; *Walker v Metroplitan Transportation Authority*, 2008 NY Slip Op 33220 [U] [Sup Ct, NY County 2008] [12 NYCRR subparts 23-1.1, 23-1.3 and 23-1.5 are not sufficiently specific to support a Labor Law § 241 (6) claim]), plaintiff does assert a violation of 23-1.21.

Defendants argue that subpart 23-1.21 (ladders and ladderways), among others, is inapplicable to this case. Specifically, defendant claims that the only relevant subsection which could apply to the case is 23-1.21 (b)(5) which concerns with wooden ladder rungs and sets forth how the ladder rungs should be constructed. Defendants claim that the subsection cannot be relied on because plaintiff did not plead any facts pertaining to the condition of the wooden A-frame ladder.

Plaintiff counters, however, that Industrial Code 23-1.21 (b) (3) (iv) mandates that "[a]ll ladders shall be maintained in good condition. A ladder shall not be used if ... it has any flaw or defect of material that may cause ladder failure," and further, that 23-1.21 (b) (1) provides that "[e]very ladder shall be capable of sustaining without breakage, dislodgement or loosening of any component at least four times the maximum load

intended to be placed thereon." These provisions have been held to be sufficiently specific to support a cause of action under Labor Law § 241 (6) (*see Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378 [2d Dept 2006]; *Fernandes v Equitable Life Assur. Society of US*, 4 AD3d 214 [1st Dept 2004]; *Santamaria v 1125 Park Avenue Corp.*, 249 AD2d 16 [1st Dept 1998]). Plaintiff's testimony reflects that he was provided with a ladder which caused him to fall, demonstrating a clear violation of both of the foregoing subsections. To the extent that defendants argue that plaintiff admitted that he did not see any defects in the ladder, the First Department has held that "[i]t does not avail defendant that it had no control over the ladder and that the defect was latent" (*Santamaria*, 249 AD2d at 17).

As such, defendants' cross motion is denied on this ground.

However, since plaintiff does not oppose defendants' cross motion with respect to the common-law negligence and Labor Law § 200 claims (first and second causes of action), that portion of the cross motion is granted. Accordingly, the first and second causes of action are severed and dismissed.

Conclusion

It appears to the court that plaintiff is entitled to judgment on liability and that the only triable issues of fact arising on plaintiff's motion for partial summary judgment with

respect to the Labor Law § 240 (1) claim (third cause of action) relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that the motion is granted with regard to liability on the third cause of action; and it is further

ORDERED that defendants may engage in pretrial discovery as to plaintiff's damages, which is to be noticed within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that at the conclusion of discovery a trial on damages shall be held; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that the cross motion of defendants Plaza Construction Corp. and New York University for summary judgment is granted to the extent that the first and second causes of action are severed and dismissed, and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 1/7/11

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.