STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

DAVID RUSSELL,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1535-09
RJI NO. 01-09-97782

MEMORIAL HOSPITAL, ALBANY, N.Y.;
AOW CORPORATION; and ROBERT CLAYDON,

Defendants.

Supreme Court Albany County All Purpose Term, January 28, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Finkelstein & Partners, LLP
Andrew Spitz, Esq.
Attorneys for Plaintiff
1279 Route 300, PO Box 1111
Newburgh, New York 12551

Shantz & Belkin
M. Randolph Belkin, Esq.
Attorneys for Defendants Memorial Hospital, Albany N.Y. and AOW Corporation
26 Century Hill Drive, Suite 202
Latham, New York 12110

TERESI, J.:

On August 28, 2007, Plaintiff was injured while unloading steel H beams from a flat bed truck, at Memorial Hospital, Albany N.Y.'s (hereinafter "Memorial Hospital") construction project. Seeking to recover for his injuries, Plaintiff commenced this action, in part, setting forth a Labor Law §240 cause of action. Now, following discovery and the filing of a note of issue, Plaintiff moves for partial summary judgment on Memorial Hospital and AOW Corporation's (hereinafter collectively "Defendants") Labor Law §240 liability. Defendants oppose the motion

and request (they made no cross motion) that this Court search the record to grant them summary judgment dismissing Plaintiff's Labor Law §240 claim. Because Plaintiff failed to demonstrate his entitlement to judgment as a matter of law, his motion is denied.

"[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On his motion, Plaintiff "bears the initial burden of demonstrating [his] entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form." (DiBartolomeo v. St. Peter's Hosp. of City of Albany, 73 AD3d 1326 [3d Dept. 2010]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If Plaintiff establishes his right to judgment as a matter of law, the burden then shifts to the Defendants to demonstrate, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Labor Law § 240(1) provides, in pertinent part, that "[a]ll contractors and owners... in the erection... 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 prevail on this motion, Plaintiff must establish that "defendants violated [Labor Law § 240(1)] and the violation was a proximate cause of the injury." (Intelisano v. Sam Greco Const., Inc., 68 AD3d 1321, 1322 [3 Dept. 2009]). As part of Plaintiff's proof relative to the Labor Law §240(1) violation, Plaintiff must "demonstrate the existence of an elevation-related hazard contemplated by the statute." (Berg v. Albany Ladder Co., Inc., 10 NY3d 902 [2008]).

In support of his motion, the only evidentiary proof in admissible form Plaintiff submits

is his own deposition and the deposition of James Urner, AOW Associates, Incorporated's vice president (hereinafter "Urner"). As the remaining deposition transcripts are neither signed nor admissible pursuant to CPLR §3116(a)'s 60 day exchange provision, they are inadmissible and of no support to Plaintiff's motion. (Marmer v. IF USA Exp., Inc., 73 AD3d 868 [2 Dept. 2010]; McDonald v. Mauss, 38 AD3d 727 [2d Dept. 2007]; Pina v. Flik Intern. Corp., 25 AD3d 772 [2 Dept. 2006]; Scotto v. Marra, 23 AD3d 543 [2 Dept. 2005]; Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2 Dept. 2008]). Likewise, because Plaintiff's attorney's affirmation is not based upon "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392, 1395 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]).

Because of this limited admissible proof, on this record, Plaintiff failed to demonstrate his entitlement to judgment as a matter of law.

Plaintiff's deposition transcript establishes that he was a professional iron worker, with approximately twenty years experience. On August 28, 2007, he and his partner were the "connectors" on Defendants' construction project. Their job, in part, was to unload a delivery of steel H beams. No safety equipment was provided for such task. Plaintiff testified that the H beam delivery that day was larger than he had ever seen, it was "overstacked." He stated that the H beams were stacked to a height of "[t]en to fifteen feet off the bed of the truck," while an acceptable load would be "eight or nine feet off the top of the bed." Without incident, he climbed to the top of the H beam load and removed the top level (lowering the total height of load approximately 18 inches). He was kneeling inside the first H beam on the second level to be removed, when it shifted and fell. He fell with it, and was injured.

Despite Plaintiff's description of the load as "overstacked," Urner testified that the load of H beams was "less than six feet" off the bed of the truck.

Due to this factual dispute and viewing the evidence in a light most favorable to Defendants, Plaintiff has not demonstrated, as a matter of law, that the risk he encountered was the type of "elevation related risk that triggers Labor Law § 240(1)'s coverage." (Toefer v Long Is. R.R., 4 NY3d 399, 408 [2005], compare Monroe v. Bardin,249 AD2d 650 [3d Dept. 1998]; Scally v. Regional Indus. Partnership, 9 AD3d 865 [4th Dept. 2004]; Intelisano v. Sam Greco Const., Inc., supra; Ford v. HRH Const. Corp., 41 AD3d 639 [2d Dept. 2007]). Nor, in searching the record, have Defendants demonstrated, as a matter of law, that Plaintiff was not subject to a risk covered by Labor Law §240(1).

Similarly, on searching this record, Defendants failed to demonstrated that Plaintiff's injury was not caused by the lack of safety equipment. Although Plaintiff testified that he had not used safety equipment in the past to unload H beams, he also testified that he had never seen a load of H beams like the one he was faced with on the day he was injured. Moreover, his prior custom is irrelevant because it is uncontested that no safety devices were provided. (Zimmer v. Chemung County Performing Arts, Inc., 65 NY2d 513 [1985]). This record simply does not establish that the lack of safety equipment was not a contributing cause to Plaintiff's fall. (Id.)

Accordingly, both Plaintiff's motion and Defendants' request are denied.

This Decision and Order is being returned to the attorneys for Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: February 10, 2011
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 5, 2011, Affirmation of Andrew Spitz, dated January 5, 2011, with attached Exhibits A-L.
2. Affirmation of M. Randolph Belkin, dated January 21, 2011.
3. Reply Affirmation of Andrew Spitz, dated January 26, 2011.