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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice PART 21

Index Number : 114945/2008

ORTEGA, CESAR

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 004

PARTIAL SUMMARY JUDGMENT

INDEX NO. 114945/08

MOTION DATE 1/11/11

MOTION SEQ. NO. 004

MOTION CAL. NO. 99

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

The following papers, numbered 1 to 5 were read on this motion for summary judgment

	Papers Numbered
Notice of Motion— Affirmation — Exhibits A-P	1-3
Answering Affirmation — Exhibits A-F	4
Replying Affirmation — Exhibits	5

Cross-Motion: ☐ Yes ■ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

MAR 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 3/25/11
New York, New York

_____, J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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CESAR ORTEGA and MARIA ORTEGA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSIT AUTHORITY, SKANSKA USA CIVIL NORTHEAST, INC., SCHIAVONE CONSTRUCTION CO., INC., J.F. SHEA CONSTRUCTION, INC.,

Defendants.

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Index No. 114945/08

Decision and Order

Hon. Michael D. Stallman, J.:

On March 29, 2008, plaintiff Cesar Ortega (plaintiff) was working as a laborer for a subcontractor at the Second Avenue subway project at East 95th Street and Second Avenue. His task that day was to help install "tremie pipe" within which concrete would be poured for below-ground wall and shaft construction. Although the "tremie rack" plaintiff was in was situated at ground level, on gravel and cribbing/dunnage (wooden planking placed beneath the surface of the tremie rack to make it more stable), plaintiff was positioned on a platform just below the top of the tremie rack, approximately eight to 10 feet above the ground, and below an adjacent rotary drilling rig. A number of pipes were located in the tremie rack with him. Plaintiff was engaged in attaching a third section of pipe to a second, and guiding the pipe as it was lifted out of the tremie rack and

lowered into the ground by the drilling rig. Suddenly, the rig jerked back, the lip of the pipe caught on the tremie rack, and the tremie rack toppled over. Plaintiff was thrown from the tremie rack, and sustained crush injuries to his foot when the tremie rack and the pipes therein fell upon him.

In its order dated August 12, 2009, the court (Beeler, J.) denied plaintiffs' earlier motion for summary judgment on the issue of defendants' liability under Labor Law § 240 (1) on the basis that little discovery had yet been had. The court denied the motion with leave to renew when discovery was complete. Plaintiffs now renew that motion.

It is uncontested that the City of New York is the owner of the property, which it has leased to the New York City Transit Authority. Skanska USA Civil Northeast Inc. (Skanska), Schiavone Construction Co., Inc. and J.F. Shea Construction, Inc. formed a joint venture operating as S3 Tunnel Constructors. Skanska was the lead company of the joint venture, and hired plaintiff's employer for the project.

"It has long been settled that 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'" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851, 853 [1985]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853; *see also Penava Mech. Corp. v Afgo Mech. Servs.*, 71 AD3d 493, 496 [1st Dept 2010] [proponent of motion "bears the initial burden of coming forward with evidence showing prima facie entitlement to judgment as a matter of law, and, unless that burden is met, the opponent need not come forward with any evidence at all"]). Once the movant has met its burden, "the party opposing such motion must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212 [b]) 'by producing evidentiary proof in admissible form'" (*Meridian Mgt. Corp.*, 70 AD3d at 510, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[A]ll of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" (*Udoh v Inwood Gardens*, 70 AD3d 563, 565 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility [interior citations omitted]" (*Meridian Mgt. Corp.*, 70 AD3d at 510-511). "When there is any doubt as to the existence of triable issues, summary judgment should not be granted" (*Udoh*, 70 AD3d at 565).

Labor Law § 240 (1) provides, in pertinent part:

> All contractors and owners and their agents ... in the erection, demolition, ... [or] altering ... 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 statute provides special protection to those engaged in the enumerated activities (*see e.g. Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003]), and imposes absolute liability upon owners, contractors and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks, such as falling from a height (*see e.g. Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

In order to make a prima facie showing of entitlement to judgment as a matter of law on his Labor Law § 240 (1) claim, plaintiff must demonstrate not only that defendants violated the statute, i.e., failed to provide him with an adequate safety device, but also that the violation was a proximate cause of the accident (*see e.g. Panek v County of Albany*, 99 NY2d 452, 457 [2003] ["the section imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty that proximately causes a plaintiff's injury"]).

Plaintiff has not met his burden of making a prima

facie showing of his entitlement to judgment as a matter of law. Of the numerous issues of fact that remain unresolved, of particular moment is the issue of whether plaintiff's accident was foreseeable. The facts indicate that plaintiff's tremie rack was knocked over by the application of the combined forces of the pipe becoming lodged in the rack and the external force of the pull or jerk of the drilling rig.

It is well-established that

> [d]efendants are liable for all normal and foreseeable consequences of their acts. To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendant's conduct was foreseeable

(*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]; *see also Harris v 170 E. End Ave., LLC*, 71 AD3d 408, 409-410 [1st Dept 2010] [crane cable struck bundle of stringers, causing it to fall: "bundle of stringers fell as a result of a foreseeable construction-related accident, not an act of God or other calamity which defendants could not have anticipated"]; *see Campbell v City of New York*, 32 AD3d 703, 704-705 [1st Dept 2006] [lineman injured when truck struck guy wire of pole, causing pole to snap: defendants had "duty to maintain the pole for foreseeable users"; truck striking guy wire was not "an unforeseeable superseding event, as a matter of law"; pole was an

elevating device analogous to a scaffold, required to be "strong enough to withstand force of reasonably foreseeable magnitude" and to survive "a reasonably foreseeable degree of external force"]).

In addition, foreseeability may be inherent in the work in which a plaintiff may be engaged (*see e.g. Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 268 [1st Dept 2007] [elevator mechanic's helper struck by counterweights: "the determination of the type of protective device required for a particular job turns on the foreseeable risks of harm presented by the nature of the work being performed"]; *Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004] [worker atop dumpster when his arm hit wire and he fell to ground: "[b]ecause the work in which he was engaged required him to climb the dumpster, the absence of a proper safety device created the kind of foreseeable risk within the contemplation of § 240 (1)"]; *Spaulding v Metropolitan Life Ins. Co.*, 271 AD2d 316, 316 [1st Dept 2000] [while plaintiff was rewiring building, cable sprang back and struck him: ladder he was standing on was "manifestly inadequate to protect him from this foreseeable and inherent elevation-related risk of the work in which he was engaged"]).

The tremie rack within which plaintiff worked was both a working surface and a protective device. In such situations, "[w]here the furnished protective devices fail to prevent a

foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statute" (*Cruz v Turner Constr. Co.*, 279 AD2d 322, 322-323 [1st Dept 2001]; *see also Callan v Structure Tone*, 52 AD3d 334, 335 [1st Dept 2008] [electrician fell from ladder in room which was over 100 degrees: foreseeable consequence that workers might suffer heat-related physical symptoms; citing *Cruz*]; *Buckley*, 44 AD3d at 267-268 ["a worker who is caused to fall or is injured by the application of an external force is entitled to the protection of the statute only if the application of that force was foreseeable"; citing (in this order) *Cruz*, 279 AD2d 322, *supra*; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762 (2006); *Bush*, 9 AD3d 252, *supra*; and *Spaulding*, 271 AD2d 316, *supra*]).

Plaintiff alleges that the "defendant[s] violated Labor Law § 240 (1) by failing to ensure the proper placement of the tremie rack" (LaSpina 1/10/11 Reply Affirm., ¶ 17), but fails to provide the testimony of an expert which would elucidate, among other issues, what standards govern the interplay of drilling rigs and tremie racks, and what measures are foreseeably necessary to ensure the safety of workers performing in these circumstances. Without such information, the court has no basis upon which to determine whether the tremie rack should have been better secured, whether it was foreseeable that the confluence of

the proximity and action of the rig, drilling into the ground and hoisting the pipes into position, with the tremie rack, with plaintiff standing in it on a platform eight to 10 feet above the ground, might put a worker at risk. Nor can the court resolve whether the external forces generated by the process of the rig drilling and hoisting, and plaintiff connecting pipes to each other on an elevated platform, posed a foreseeable hazard.

The court does not consider the evidence that the day after the accident, large, flat metal plates were welded to the bottom of the tremie rack to increase its stability, because "[i]t is well settled that evidence concerning post-accident repairs is generally inadmissible ... and is never admissible as proof of admission of negligence" (*Fernandez v Higdon El. Co.*, 220 AD2d 293, 293 [1st Dept 1995]). Moreover, the court does not opine as to whether such remedial measures would be admissible at trial for a limited purpose.[1]

Plaintiff's contention that the unsigned, but certified, 50-h transcript, and the uncertified hospital records cannot be considered is without merit (*see e.g. Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009]; *Borchardt v New York*

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[1] The admissibility issues might have been obviated by expert evidence of industry practice and the feasability, from an engineering perspective, of having done such underpinning before the accident, and whether such underpinning for stability should be considered "proper protection" within the meaning of Labor Law § 240 (1).

Life Ins. Co., 102 AD2d 465, 467 [1st Dept], *affd* 63 NY2d 1000 [1984]).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied.

Dated: March 25, 2011
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN