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

PRESENT: HON. PAUL WOOTEN Justice PART 7

LORENZO CRUZ,

Plaintiff,

- against -

RAMON A. PEREZ and CARMEN I. PEREZ,

Defendants.

INDEX NO. 108696/08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion by plaintiff for partial summary judgment pursuant to Labor Law § 240(1).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

FILED
APR 13 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ■ No

In this action, Lorenzo Cruz ("plaintiff"), seeks to recover damages for personal injuries he sustained as a result of an accident that occurred in the course of his work as a construction worker. Ramon A. Perez and Carmen I. Perez ("defendants") are the owners of the site where the accident occurred. Before the Court is a motion by the plaintiff for partial summary judgment on the issue of liability under Labor Law § 240(1).

Background

On April 16, 2008, plaintiff, a construction worker, sustained serious injuries as a result of an accident occurring during the course of his work at the premises located at 143 Woodworth Avenue, Yonkers, New York. Plaintiff fell from a height of approximately 12 feet while standing on a concrete column and pipe scaffolding and attempting to remove wood forms attached to a concrete column. Plaintiff states that as he attempted to pry the wood off the column, the scaffold suddenly moved backwards, shifted and collapsed, causing plaintiff to

fall.

Plaintiff claims that prior to the accident, he never had any construction experience nor any experience using scaffolds. His supervisor, Mr. Cruz (no relation), gave him directions at the premises and told him to use the scaffold, already in place when he arrived. The accident occurred during his first day at work.

Plaintiff brings this action pursuant to § 240 (1) of the Labor Law. He identifies defendants as the owners of the premises. He asserts that had he been provided with proper safety devices for his protection, as opposed to an unsecured scaffold, he would not have been injured.

Plaintiff moves for partial summary judgment on the issue of liability under Labor Law 240 (1) and requests a trial to assess damages resulting from the accident. He argues that defendants' failure to secure the scaffold with safety equipment, such as railings or guardrails on the sides, was a proximate cause of his accident. Plaintiff provides photographs of the premises, including what is described as a fair and accurate representation of the scaffolding, his affidavit and deposition testimony, and the deposition testimony of defendants.

In opposition, defendants contend that there remains an issue of fact as to whether plaintiff's action on the scaffold was the sole proximate cause of his injuries. They hold that plaintiff may have misused the scaffold that was provided for him. Defendants cite various cases in which summary judgment was denied due to questions concerning plaintiff's conduct. For example, in *Alvarez v Long Island Fireproof Door, Inc.*, (305 AD2d 343 [2d Dept 2003]), plaintiffs sustained personal injuries when they fell from a platform approximately 10 feet above the ground while installing an electric door opener. One plain-tiff claimed that the accident occurred as a result of the other plaintiff leaning against a certain wooden guardrail which then gave way. The Court denied summary judgment, holding that an issue of fact existed as to whether plaintiffs removed the wooden railing from the platform before the accident and whether that act constituted the sole proximate cause of the accident. Defendants assert that

plaintiff may not have used the scaffold properly because, before the accident, one of his feet was on the scaffold and the other foot was on a concrete column. It is defendants' contention that if plaintiff's improper use of the scaffold is demonstrated, then defendants' liability under the Labor Law is not appropriate.

In reply, plaintiff argues that whether he is solely responsible for his injuries is purely speculative. He asserts that defendants have not come forth with proof to controvert that plaintiff fell from an unsecured scaffold that had no platform, guardrails, and other safety equipment, which shifted and collapsed, and that the presence of such an unsecured scaffold, is sufficient proof of a violation of § 240(1). He claims that the cases cited by defendants are not similar to the situation in this case. With respect to *Alvarez*, for example, the facts there allegedly are distinguishable to the facts in this matter. In that case, the platform that supported plaintiffs had a guardrail. The question of fact concerned whether plaintiffs removed the guardrail from the platform before the accident and whether the removal was the sole proximate cause of the accident. In this case, plaintiff argues that he did not have any guardrails or even a platform to stand on.

Standards- Summary Judgment and Labor Law § 240(1)

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240(1)

Labor Law § 240(1), known as the "scaffold" law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In enacting the statute, the Legislature "intended to place 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor,' rather than on the workers themselves" (*Stringer v Musacchia,* 11 NY3d 212, 216 [2008], quoting *Sanatass v Consolidated Investing Co., Inc.,* 10 NY3d 333, 338 [2008]). The statute provides in pertinent 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."

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her

injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st De pt 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff's actions were the sole proximate cause of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross*, 81 NY2d at 501). In *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], however, the Court of Appeals clarified that the dispositive inquiry does not depend upon whether the injury resulted from a "falling worker" or "falling object." According to *Runner*, "the governing rule is . . . that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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*'" (*id.* [quoting *Ross*, 81 NY2d at 501] [emphasis in original]).

Discussion

In his papers, plaintiff states that prior to the accident, he was removing wood forms that covered a concrete column. The concrete for the columns had already been poured into the wood forms. The wood forms had to be removed because the column cement had hardened. Plaintiff was using a crowbar to remove the screws and nails that affixed the wood forms to the columns. Before the scaffold collapsed, plaintiff was standing with one foot on top of the column

and the other foot on the top of the pipe scaffold.

Plaintiff states in his affidavit that as he was removing the wood form attached to the column, "the scaffold suddenly shifted and collapsed causing me to fall to the ground" (Plaintiff's Motion, Exhibit B ¶ 2). "Where a safety device has been furnished, and it collapses, a prima facie case of liability under Labor Law 240(1) is established" (*Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [1st Dept 2003]; *see also Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994] ["[T]he collapse of a scaffold is prima facie evidence of a violation of Labor Law § 240(1) which shifts the burden to defendants to raise a factual issue on liability"]; *Perez v Chase Manhattan Bank,* 262 AD2d 160 [1st Dept 1999] [summary judgment on liability properly granted, because plaintiff's sworn statements that she fell and sustained injuries when the scaffold on which she was standing collapsed, established a prima facie case under Labor Law § 240(1)]). Accordingly, plaintiff has met his prima facie burden of establishing his entitlement to summary judgment as a matter of law as to liability under Labor Law § 240(1).

In opposition, the defendants fail to raise a triable issue of fact. The Court notes that in their opposition to plaintiff's motion, defendants do not deny that there was no safety equipment like a rope, harness, or netting, securing the scaffold prior to the accident, nor was there any guard rail or safety railing on the sides. Defendants argument, that plaintiff's improper use of the scaffold was the proximate cause of his injuries, is unavailing here. Plaintiff's conduct, having one foot on the column and one foot on the scaffold, while removing the wood forms was foreseeable given the nature of the work and is, at most, contributory negligence.

It is well settled, "that the injured's contributory negligence is not a defense to a claim based on Labor Law § 240(1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices" (*Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *see also Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003] [holding that liability is contingent on a statutory violation and proximate cause, and once established, contributory negligence cannot defeat the plaintiff's claim]).

The Court finds the lack of safety equipment for the scaffold and its collapse a proximate cause of the accident (*see Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010] [First Department held that the failure of appellants to properly construct and secure the scaffolding, and the failure to provide adequate safety devices was a proximate cause of plaintiff's injury]). Plaintiff is not solely liable for the accident, and even if partially responsible, his actions would not exculpate the defendants (*see id. at 592-593*). Therefore, plaintiff is entitled to partial summary judgment with respect to liability under Labor Law § 240 (1).

Conclusion

Accordingly, it is,

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted and plaintiff is entitled to judgment on the issue of liability; and it is further;

ORDERED that the matter of assessing damages shall be considered upon the commencement of trial.

This constitutes the Decision and Order of the Court.

Dated: 4-11-11

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**