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SHORT FORM ORDER

INDEX No. 09-13309

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 7-22-10
ADJ. DATE 1-26-11
Mot. Seq. #001 - MD

JOSEPH VETRANO and JULIE VETRANO,

Plaintiffs,

- against -

J. KOKOLAKIS CONTRACTING, INC.,

Defendant.

SACKS & SACKS, ESQS.
Attorney for Plaintiff
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New York, New York 10038

CASCONE & KLUEPFEL, LLP
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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13-17; Replying Affidavits and supporting papers 18-23; 24-unsigned, partial attorney affirmation; Other 25; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this pre-note motion (001) by the plaintiffs, Joseph Vetrano and Julie Vetrano, pursuant to CPLR §3212 for an order granting summary judgment on the cause of action premised upon the defendant's alleged violation of Labor Law §240 (1) is denied.

The plaintiffs' complaint arises from an accident wherein Joseph Vetrano (hereinafter plaintiff), seeks damages for personal injury he sustained on February 23, 2009, during his employment with Derek K. Miller Enterprise (hereinafter Miller), while working at an elevated height on a steel superstructure. He claims that he fell while walking across an intermediate stringer without appropriate safety devices due to the defendant's alleged negligence and violation of Labor Law §§ 200, 240, 241(6) premised upon the violation of Title 12 NYCRR 23, including, but not limited to, §§ 23-1.5, 23-1.7, 23-1.15-23-1.17, 23-2.1, 23-2.3, 23-5, 23-6, and Occupational Safety and Health Act (hereinafter OSHA), Article 1926. He claims that J. Kokolakis Contracting, Inc. (hereinafter defendant) was the general contractor at the job site for the project. A derivative claim has been asserted on behalf of the plaintiff's spouse, Julie Vetrano.

The plaintiff seeks summary judgment on the cause of action premised upon the defendant's alleged violation of Labor Law §240(1), based upon the defendant's failure to provide lanyards or other safety devices, or safety lines on the stanchions, for the plaintiff to tie his safety belt, and protect himself from falls.

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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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, the plaintiff has submitted, inter alia, an attorney's affirmation, the affidavit of Lee Rossa (hereinafter Rossa); copies of the summons and complaint and defendant's answer; unsigned transcripts of the examinations before trial (hereinafter EBT) of Bernard Mulligan (hereinafter Mulligan) on behalf of the defendant, dated October 13, 2009; the plaintiff and Julia Vetrano, dated October 13, 2009; and a partial copy of a subcontract, dated October 30, 2008, between the defendant and Canatal Industries, Inc.(hereinafter Canatal) for the Armed Forces Reserve Center, Farmingdale, New York, on the premises owned by the U.S. Property and Fiscal Office-NY.

The unsigned copies of the EBT transcripts are not in admissible form as required by CPLR §3212 (see, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), are not accompanied by an affidavit pursuant to CPLR §3116, and are not considered on this motion. A motion pursuant to CPLR §3212 must be supported by an affidavit by the moving party having knowledge of the facts and circumstances of the action or a signed EBT transcript. Because the plaintiff has not submitted a signed EBT transcript or a supporting affidavit, the motion fails to comply with CPLR §3212. Even if the motion comported with the requirements of CPLR §3212, and the Court should consider the EBT transcripts, there are factual issues which preclude summary judgment.

At his EBT, Rossa testified that he was a journeyman ironworker employed by Miller when the plaintiff was injured on February 23, 2009. He stated that it was a freezing day with temperature below 20o F. The plaintiff was working on the first floor steel, prepping it for a double connection which connected three pieces of structural steel where they met. When the plaintiff was prepping on the first column line running east and west, he was tied into a tie line. Once he loosened those bolts, he had to walk across an intermediate stringer to get to the opposite column line approximately twenty five feet across from where he was standing. There were no tie lines, stanchions or any safety devices erected on the intermediate beam on which to tie the safety belt. As the plaintiff walked across the steel, he slipped on ice causing him to fall to the ground below. There was no safety netting between the first floor and the area where the plaintiff landed.

At his EBT, Mulligan testified that he was employed by the defendant, the general contractor, as the general superintendent overseeing field activities. He had been working for Kokolakis for thirty-one

years. At the time of the accident, he was assigned to the Armed Services Reserve Center in Farmingdale, Long Island, New York. A four story building was under construction to house the Armed Forces reservists. The defendant hired Canatal as the structural steel subcontractor for the project to erect the steel. Canatal subcontracted with Miller, the plaintiff's employer. Mulligan stated that the defendant did not provide safety equipment to Miller's employees, and he did not know if Canatal did. Mulligan stated he was in charge of the project and that he had the authority to stop work, except for conditions wherein it was snowing, raining, or any other weather related conditions. There was no site safety coordinator or supervisor working at the project. Mulligan stated that grade was the first floor; steel started on the second floor; and there was a third and fourth floor with a roof deck.

Mulligan further testified that he had observed steel erection during the project and at times observed workers walking across beams to take the chokers off. This, he stated, was somewhat standard. Prior to the accident, workers often walked on the flange to get across to take the chokers of the beams being erected. After the accident, they were instructed to walk on the flange. He recalled that the perimeter of this project had angles, and safety cable was installed once there were open shafts and decking had been erected. Mulligan indicated that Tim O'Connor (hereinafter O'Connor), the superintendent of the steel erection, was in charge of the steel erection for the ironworkers, and gave instructions to the ironworkers on a daily basis. Mulligan testified that the supervisor for the ironworkers had the authority to put safety lines on every piece of steel erected on the project. Mulligan stated that the defendant did not erect any life or safety lines. He continued, however, that it is the ironworkers responsibility to work under the guidelines established by the industry and OSHA. Mulligan did not instruct anyone to put safety lines on every piece of steel on this project, and he did not know who made the determination concerning where the safety lines would be placed. Although Mulligan stated he did not witness the accident, he estimated that the distance from where the plaintiff fell to the first floor was approximately fifteen feet seven inches. Mulligan did not see any safety netting in the area. He classified the incident as a slip/fall incident, but he did not go to the beam to see what may have caused the plaintiff to slip. He indicated in an accident report he prepared that the plaintiff slipped on ice on the beam, as that was the general consensus. He stated that he did not know if any supervisor for the ironworkers inspected the steel or walked the steel on the morning of the incident before letting the journeymen go onto it.

At his EBT, the plaintiff testified that he completed a three-year apprenticeship consisting of on-the-job and classroom training to become an ironworker. Thereafter, he became a journeyman ironworker in 2005. On the date of the accident he had been employed by Miller for two years. He worked mostly in the "raisen gang," which is the group that actually erects the steel. Within that raisen gang, he was working as a "connector" to erect steel by attaching the beams with bolts. Mario Carbinaro (hereinafter Carbinaro) and O'Connor were his foremen on the job. Each day the raisen gang met by the crane with the foreman who gave the work instructions for that day.

The plaintiff stated that on the date of the accident, four floors of the building had been completed on the west end. He was working on the easterly side of the building. The foreman made the determination concerning whether or not to work based upon the weather conditions. He stated the accident occurred on a Monday, and he believed it had rained over the weekend. At the time of the accident, he was wearing, inter alia, work boots with ribbed soles, a hard hat, a harness and a tool belt. The harness was a regulation zip-up work harness, with an interlocking chest strap, leg straps on the body, and a six-foot lanyard with two hooks on the back of the harness. Each day, in the normal course of his duties, he tied down the lanyard to a safe, convenient spot, such as an independent line, by hooking the lanyard onto the line. There were some connecting ropes on this job. He testified that if there was no "tie-off" supplied, they would keep on working, and thought they should tell the boss if there were no "tie-offs". He stated that the beams and flanges on which they walked varied in size.

Weather conditions were not a determining factor concerning whether or not to walk along a flange as opposed to walking along the top of a beam. On a typical day, he would walk along the beam itself. Under wet or snow conditions, he tried not to go on the iron, as it is too much of a hazard.

The plaintiff further testified that on the date of the accident, he started working on the second floor, but his foreman, Carbinaro, instructed him to move to the first floor, one level above ground level, to start setting beams into place by getting the doubles ready. His partner went to the ground floor to pick out the steel beams to be used. The doubles were two pieces of iron which share one connection point. The doubles were readied by taking the nuts off the bolts which are in the steel they had already set. The beams would share the same bolt. He did this at one location which he had reached by walking on the beam while he was tied off. His lanyard was affixed to the rope that was located along the beam at his feet, permitting him to move along the beam. He had to untie his lanyard and walk along the top of a beam to transfer to the next location. However, there was no rope to tie off between the first and second location as the rope was only strung along the headers on the first floor. He walked about fifteen feet on that beam, which was about six inches wide, with about a little less than a three inch flange at the bottom of the beam. The plaintiff stated that while he was walking, he slipped on ice, his body went up, his head hit the beam, he fell off the beam to the ground level, and landed on the concrete surface.

The plaintiff stated that prior to the fall he did not voice any complaint about the lack of a rope to which he could tie himself. This was not the first time on this particular job site that he had encountered a situation where there was no tie rope. He had never been instructed by anyone from Miller not to walk on the beams or told to walk on the flange instead, and, in fact, if there was wind, they walked on the top flange. There were no situations where they would walk on the bottom flange. He was not advised by any of his supervisors what to do if there was no tie-off rope. He stated that it was a general understanding that work would be continued if there was no "tie-off" rope.

At his EBT, O'Connor testified that on the date of the accident he was employed by Miller as an ironworker supervisor. On February 23, 2009, Miller was performing structural steel work at the Armed Services Reserve Center in Farmingdale, Long Island, New York for the purpose of erecting the steel frame of the building. He continued that there were safety lines throughout the structural steel frame to which the ironworkers would attach lanyards on their safety harnesses. These would provide protection in the event an ironworker fell from a height while working. O'Connor stated that there were isolated areas on this job site where safety lines were not available. He stated that if there was no safety line available, the proper procedure was to utilize an adjustable beam clamp. He continued that the adjustable beam clamps could be hooked onto the top flange of any I-beam of the structural steel frame. There was a ring on the top of the beam clamps to which a worker's lanyard could be attached. The ring slid behind the worker using it to provide protection from a fall. The clamps were located in the Miller on-site shanty. O'Connor stated that all Miller ironworkers working on this project knew that the adjustable beam clamps were readily available for their use.

Labor Law §240 (1). Scaffolding and other devices for use of employees at section (1) provides:

> "[a]ll 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."

"Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation" (*see,* ***Plotnick et al v Wok's Kitchen Incorporated, et al,*** 21 AD3d 358, 800 NYS2d 37 [2nd Dept 2005]; ***Handlovic v Bedford Park Development, Inc.,*** 25 AD3d 653, 811 NYS2d 677 [2nd Dept 2006]). Labor Law §240 (1) was enacted 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" (***Cruz v The Seven Park Avenue Corporation et al,*** 5 Misc3d 1018A, 799 NYS2d 159 [Supreme Court of New York, Kings County 2004]). In ***Ortega et al v Puccia et al,*** 57 AD3d 54, 866 NYS2d 323 [2nd Dept 2008], the Court held that Labor Law §240 was intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in §240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury.

Here, the plaintiffs have failed to meet the burden of establishing prima facie entitlement to summary judgment as a matter of law, as there are factual issues which preclude summary judgment. Mulligan testified on behalf of the defendant general contractor that he was in charge of the project and that he had the authority to stop work. He also indicated that there was no safety supervisor at the job site. He had observed steel erection during the project, and, at times, saw situations where a worker had to walk across a beam to take the choker off a beam. He stated that this was somewhat standard. Prior to the accident, workers often walked on the flange to get across the beams to take the chokers off the beams being erected. After the accident, workers were instructed to walk on the flanges and not to walk on the beams. Thus, there are factual issues concerning whether the general contractor failed to exercise the authority to stop work if its superintendent saw a safety violation or dangerous condition wherein workers were walking across elevated beams without their lanyards attached. There are further factual issues as to the existing policy regarding workers walking on flanges.

Although O'Connor averred that there were clamps available which workers could use to attach to the beams when working at heights when there was no tie line available, there are factual issues as to the ready availability of those clamps to the workers. O'Connor testified that the clamps were kept in the shanty, but did not indicate whether the workers had access to the shanty. O'Connor did not testify how these clamps were made available to the workers when they were in the process of working on an elevated beam. There are factual issues concerning why the workers were not provided the clamps to use on a regular basis.

The plaintiff testified that it was common practice to walk the beams without the lanyard being tied onto a safety line. There are also factual issues concerning why the beams the plaintiff was working on at the time of the accident did not have lines for him to secure himself. There are further issues concerning the availability of safety nets if no "tie-off" lines were available. Moreover, no one has presented proof as to whether the beams were inspected on the day of the accident for ice or other slippery conditions to ensure a safe work place. While a copy of the contract between the defendant and Canatal has been submitted, it is only a partial contract. This Court has not been provided the riders to this contract, leaving this Court to speculate as to its provisions. The agreement between Miller and the defendant has not been submitted for this Court's review. Finally, there are further factual issues concerning whether any alleged breach of Labor Law §240 by the defendant proximately caused the plaintiff to sustain injury.

Accordingly, the plaintiffs' motion for summary judgment on the cause of action premised upon the defendant's alleged violation of Labor Law §240 is denied.

Dated: JUN 01 2011

J.S.C.

___ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION