[* 1]

ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA Part 11

----------X

JOSE ORELLANA SIGUENZA,

Plaintiff,

-against-

CEMUSA, INC., CEMUSA NY, LLC SHELTER EXPRESS CORP. and THE CITY OF NEW YORK,

Defendants.

----------X

Index No.: 27215/2009

Motion Date: June 8, 2011

Cal. Nos: 23 & 24
Seq. Nos: 3 & 2

QUEENS COUNTY CLERK'S OFFICE
FILED
2011 JUL 15 P 3:44
RECORDED

The following papers numbered 1 to 14 read on (1) the defendant's motion for summary judgment, pursuant to CPLR § 3212, dismissing plaintiff's complaint on the grounds that there is no cause of action in common law negligence and/or no cause of action pursuant to Labor Law §§ 240(1) or 241(6), and on (2) the plaintiff's motion for summary judgment pursuant to CPLR § 3212, on grounds that plaintiff is entitled, as a matter of law, pursuant to Labor Law § 240(1).

	PAPERS NUMBERED
Notice of Motion(Defendant) - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation - Exhibits.....	4 - 5
Reply Affirmation - Exhibit.....	6 - 7
Notice of Motion(Plaintiff) - Affidavits - Exhibits.....	8 - 10
Opposition Affirmation - Exhibits.....	11 - 12
Reply Affirmation - Exhibits.....	13 - 14

Defendants move for summary judgment on the grounds that plaintiff has failed to establish a cause of action in common law negligence or under Labor Law §§ 240(1) and 241(6). Plaintiff moves for summary judgment on the grounds that defendants are absolutely liable under Labor Law § 240(1) for failing to provide adequate safety device(s) to assist him in descending from the top of the cab on a dump truck that had been used to prepare a site for the installation of a bus shelter.

On July 16, 2008, plaintiff, an employee of a non-party sub-sub contractor, Pro Concrete Inc., was injured while descending from the top of the cab portion of a dump truck used to haul cement debris from a construction site. Plaintiff's duties required him to stand on top of the dump truck bed and, utilizing a sledgehammer, further demolish large pieces of concrete as the ground where the proposed bus shelter was being broken up and deposited into the dump truck for ultimate disposal. The day's work had just finished when plaintiff, upon exiting the top of the truck, fell off the side, having held on to an object that allegedly broke off, causing him to fall to the ground and sustain injuries. In his pre-trial deposition plaintiff states that the object he attempted to hold on to was not a handle, but for lack of a better descriptive word, called the object that he claims fell off, a handle.

In order to establish a prima facie case for liability under the scaffold law, the plaintiff must demonstrate that the risk of injury from an elevation-related hazard was foreseeable, and that an absent or defective protective device of the type listed in the statute was the proximate cause of the injuries alleged. (*Danton v Van Valkenburg*, 13 AD3d 931 [2d Dept. 2004][claim resolved as a matter of law where an elevation-related safety device collapses, slips or otherwise fails to perform]; *Shipkuski v Watch Case Factory Associates*, 292 AD2d 587 [2d Dept. 2002].)

In order for the defendants to prevail, they must establish the premise that merely because a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by the scaffold law. Defendants must also establish that the action does not entail the hazards presented by "a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (*Narducci v. Manhasset Bay Associates,* 96 N.Y.2d 259 [2001]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 5099 [2001].) Where, as here, the plaintiff alleges that an accident occurred not in the hoisting and/or securing of objects and the risk of elevation, but rather, that in gaining access to the job site necessarily entails the act of attaining a certain elevation, then in that event the court finds that Labor Law § 240(1) is applicable. Furthermore, the court notes that contributory negligence on behalf of the plaintiff, in any event, will not exculpate a defendant who has violated the statute and proximately caused said plaintiff's injury. (*see, Blake v Neighborhood Housing Services of New York*, 1 NY3d 280 [2003]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Haimes v New York Tel. Co.*, 46 NY2d 132 [1978].)

Undisputed by the parties is the fact that no ladder was supplied or available for plaintiff's use to access the top of the cab. Furthermore, all parties agree that the use of a ladder or other device to assist in climbing was never utilized.

Defendants offer the self-serving testimony of Paul M. Posinelli, manager of non-party Pro Concrete, Inc., plaintiff's employer at the time of the accident, alleging that it is the universally accepted practice to climb up and down from a dump truck utilizing rungs on the back of the truck bed in conjunction with one of the rear tires, is without sufficient evidence to support such an assertion. Plaintiff alleges that he fell while attempting to descend from a platform located on top of the cab of the truck over eight feet high from the ground. The court notes that it is an issue for the trier of fact as opposed to a matter of law as to the feasibility for

plaintiff to first, descend from the platform located on top of the cab, approximately ten feet above ground, and then cross the bed of broken-up cement, fifteen feet long and more than several feet deep, in order to exit the truck according to what defendants allege is the accepted method of egress. As all parties acknowledge in the instant action, the Court of Appeals in *Toefer v Long Island Railroad*, 4 NY3d 399 [2005] noted, when work is performed only a few feet from the ground, the use of a safety device such as those listed in Labor Law § 240(1) are not contemplated by said statute, however, the Court did state the obvious, which is that where "the distance between the work platform and the ground is relevant; no one would expect a worker to come down without a ladder or other safety device from a work platform that was 10 feet high." (*See Toefer v Long Island R.R.*, supra.)

This court notes that despite defendants' argument that the project did not involve construction as contemplated by statute fails in light of the fact that defendants also acknowledge that the demolition of the cement was required in the construction of a bus shelter, thus, a "necessary and incidental" aspect of the entire project. (*See D'Alto v 22-24 129th Street, LLC*, 76 AD3d 503 [2d Dept. 2010].) Defendants also argue that plaintiff's injuries occurred after the day's work was done, and therefore, not within the purview of the Labor Law. This argument also fails since defendants also admit that the accident occurred as plaintiff was exiting the truck while still at the work site. Defendants rely on numerous cases that can be distinguished from the instant action since plaintiff in this action did not fall from an elevated risk activity while actively engaged in loading or unloading of materials. (*See Toefer v Long Island R.R.*, supra; *Phelan v State*, 238 AD2d 882 [4th Dept. 1997]; *Narrow v Crane-Hogan Structural Systems, Inc.*, 202 AD2d 841 [3d Dept. 1994]; *Cabezas v Consolidated Edison,* 296 AD2d 522 [2d Dept. 2002].)

A question of fact is posed where, as here, the cause of the accident has not been clearly indicated through any testimony provided by either party. Neither party has successfully submitted sufficient evidence to establish what, if any, are the industry standards for the imposition and use of safety devices in similar situations. Plaintiff's allegations that he does not have to prove that a handle or grappling device was defective and therefore, the proximate cause of his injuries fails when what is asked for is to have the court speculate as to what caused the plaintiff to fall. Conflicting testimony of the parties in describing where plaintiff fell from, with plaintiff testifying that he fell from the platform above the cab of the truck and Mr. Posinelli testifying that plaintiff fell trying to climb out of the bed of the truck pose sufficient questions of fact to deny any motion for summary judgment. The court cannot determine, as a matter of law, whether or not strict liability can be imposed. (*see, Blake v Neighborhood Hous. Servs.*, 1 NY3d 280 [2003]; *Vouzainas v Bonasera*, 262 AD2d 553 [2d Dept. 1999].) It is well established that a party must provide evidence "beyond mere speculation" as to the proximate cause of an accident. (*Zuckerman v City of New York*, 49 NY2d 557 [1980].) A party moving for summary judgment bears the burden of eliminating all issues of material fact, and the failure to do so requires the denial of the motion, regardless of the insufficiency of plaintiff's opposition thereto. (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) Depending upon a determination at trial, plaintiff may, however, establish a section 240 (1) violation for failure to provide a proper safety device. (*Meade v Rock-McGraw,* 307 AD2d 156 [2d Dept. 2003].)

Where a fuller examination of the facts will be required, the motion for summary judgment must be denied. Therefore, both defendants' motion and plaintiff's motion are hereby denied.

Dated: July 11, 2011

SIDNEY F. STRAUSS, J.S.C.