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

PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

REMIGIUSZ DOBRZYN,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY AND BEYS SPECIALTY, INC.

Defendants.

INDEX NO. 117102/2008

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. 001

The following papers, numbered 1 to ____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits	2
Replying Affidavits	3

Plaintiff brings this action to recover for injuries he sustained on June 27, 2008 around 10 p.m. while working on a construction project at Public School 8 ("PS 8") located at 465 West 167th Street, New York, New York ("the Premises"). Plaintiff now moves for partial summary judgment pursuant to CPLR §3212 on the Labor Law §240(1) cause of action.

The City of New York is the Owner of the Premises. Beys Specialty, Inc. ("Beys") is a general contractor hired to do brick renovation, roofing work and parapet replacement on the Premises. Beys hired several subcontractors, including Mac Design ("Mac") to do the construction work. Plaintiff was employed by Mac.

Plaintiff alleges that on June 27, 2008, while laying bricks on an exterior wall of the building, he sustained injuries due to the collapse of one of the brackets that attached the scaffold to the wall of the building, and because he was not provided with any other safety devices such as a harness or lifeline.

In support of his motion for partial summary judgment, Plaintiff provides: the pleadings, the stipulation consolidating two actions brought by Remigiusz Dobrzyn, the verified bill of particulars, the 50-h hearing transcript, photographs of the location of Plaintiff's accident taken by his son three weeks after the incident, the deposition testimony of Remigiusz Dobrzyn, the deposition testimony of Nicholas Zacharis, of the New York City Construction Authority, the deposition of Augustine Ojo, of Beys, and the June 1, 2009 transcript of Remigiusz Dobrzyn's hearing before the Worker's Compensation Board.

Defendants do not provide any additional documents in opposition.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Plaintiff moves for summary judgment on its Labor Law§ 240(1) claim. Labor Law §240(1) protects employees engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." The duty consists of providing "scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices."

However, Section §240(1) is only applicable to "gravity related accidents such as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured." (*Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NYS3d 494, 610 NY2d 49 [1993]). Where an owner or contractor fails to provide any safety devices, liability is mandated by Labor Law §240(1), without regard to external considerations. (*Zimmer v. Chemung*, 65 NY2d 522 [1985]).

Furthermore, "a worker may recover pursuant to Labor Law §240(1) if he is

injured by a gravity related accident, even if he did not actually fall." (*Pesca v. City of New York*, 298 AD2d 292, 749 NYS2d 26 [2002]). The statute applies where a worker was injured in the process of preventing himself from falling. *(See, Pesca, 298 AD2d at 292, 749 NYS2d 26).*

Plaintiff provides testimony from his 50-h hearing, where he says that he was standing on scaffolding just below the parapet wall, when he was about to nail a "two by four" to the corner of the building at or about the roof line so as to ensure that the bricks were aligned straight. He indicates that as he stepped from the parapet wall, he placed his right foot on the bracket that attached the scaffold to the wall. Right as he placed his foot on the bracket, it broke free from the wall, causing him to fall. As he was falling, he reached out and managed to grasp part of the scaffolding with his right hand and hold on so as to prevent him from falling to the ground.

According to the Affidavit of Augustine Ojo, a supervisor for Beys, the subject scaffolding was erected in such a way that there was a space of some eighteen to twenty-four inches between the scaffold and the facade of the building where the brick work was being done. The Affidavit of Nicholas Zacharis, a project officer for the NYC Construction Authority, says that to secure the scaffolding to the wall, horizontal poles were attached to the scaffold and then bolted into the brick wall of the building.

Plaintiff provides evidence that Defendants were aware that the scaffolding did not offer sufficient protection at the time of Plaintiff's accident, and they did nothing to prevent workers from using the scaffolding until such conditions were remedied. When asked about inspections conducted by the School Construction Authority safety inspectors, Nicholas Zacharis states that there were numerous deficiencies regarding the scaffolding at the job site, including "missing guardrails", "missing cross braces, insufficient fall protection, lack of safety netting around the scaffold, insufficient anchorage of the scaffold to the building, leading him to conclude, "the whole thing's a mess".

In addition, Plaintiff provides evidence that Defendants failed to provide proper safety devices pursuant to Labor Law §240(1).

At his 50-h hearing, Plaintiff's testimony is as follows:

Q. Did you have any kind of a harness on at the time of the accident?
A. No

The Affidavit of Marcin Dobrzyn, Plaintiff's son, also an employee of Mac states, "we did not have any safety devices available to us at this site for as long as I have been working there. I still work on the same site. There have never been any safety harnesses, safety lines, nets or hook ups for the lines." Additionally, the Affidavit of Mariusz Zielinski, also an employee of Mac, says that she worked with Plaintiff at the site, and that "[t]here were no safety devices at the above location at any time that I was working there. There were no life lines, no safety harnesses nor safety nets that could prevent a fall. There were also no hooks for the life lines."

In opposition, Defendant asserts that MAC employees were provided with harnesses with which to attach to safety lines at the site.

Defendants refer to the following testimony of Mr. Ojo:

Q. Were there any rules or requirements in place in June 2008 that when a MAC Design person was on the scaffold, that they would utilize any kind of a safety device?
A. Yes
Q. What kind of rules were there with respect to the use of the safety devices when MAC Design people were on the scaffold.
A. Make sure they have harnesses. They were provided with harnesses.
Q. Who provided them with harnesses?
A. MAC Design.
Q. Where are the harnesses kept?
A. Big area, the storage area.
Q. The same area where they kept their equipment and material that you told us about?
A. Yes.
Q. Did you see MAC Design harnesses on the site?
A. Oh, yes.
Q. When you walked the site from time to time, did you ever observe MAC Design employees on the scaffold not using a harness?
A. No.

Mr. Oro testifies that he taught weekly safety meetings for all Mac employees who were at work on the day of the meeting. However, he could not state whether Plaintiff was working when those meetings were held, or that Plaintiff was present at such meetings. Mr. Oro also indicates that Bey hired an outside company called Pro Safety, to do on-site safety inspections on a daily basis, yet no testimony is provided by Pro Safety. Moreover, Mr. Oro states that Mac's safety equipment was stored in an area of his on-site office. Although Mr. Oro states that he was on site the day of Plaintiff's accident, there is no evidence offered that Plaintiff was ever directed to wear a harness or use the safety equipment stored in Mr. Oro's office.

The recalcitrant worker doctrine requires a showing that adequate and safe equipment was provided but that the injured worker refused to use it. (*Gordon v. Eastern Ry. Supply, Inc.*, 82 NY2d 555, 626 NE2d 812, 606 NYS2d 127 [1993]). The general availability of safety equipment at a work site does not relieve the defendants of liability. (*Cherry v. Time Warner*, 66 AD3d 238, 885 NYS2d 28 [1st Dept 2009]). To avail itself of a sole proximate cause defense, a defendant must establish that plaintiff knew exactly where the device was located and that, based on a job-site practice, plaintiff was to obtain the safety device him or herself because it was easy to do so. (*Auriemma v. Biltmore Theatre, LLC*, 92 AD3d 1, 917 NYS3d 130 [1st Dept 2011]). Defendant fails to provide proof in admissible form which raises an issue of fact that safety devices were readily available, that anyone told plaintiff to use the safety devices or that Plaintiff refused a direction to use such device.

The uncontroverted evidence that the scaffold failed and no other safety device was provided to Plaintiff for his protection justifies a granting of summary judgment on this issue of liability as to plaintiff's Labor Law §240(1) claim.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for partial summary judgment is granted as to issue of liability only on his Labor Law §240(1) cause of action.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 16, 2013

J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE