Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12
Justice

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TOMAS PLATA and CELESTE PLATA,

Plaintiff,

-against-

PARKWAY VILLAGE EQUITIES CORP,

Defendant.

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Index No.: 32372/09

Motion Date: June 13, 2013

Cal. No.: 109

Seq. No.: 2

The following papers numbered 1 to 16 read on this motion by plaintiffs for summary judgment pursuant to Labor Law §240(1) and cross-motion by defendant to dismiss plaintiff's complaint pursuant to Labor Law §240(1), §241(6) and §200.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits.....	1-11
Notice of Cross Motion, Affirmation.....	12
Plaintiffs' Reply/Affirmation in Opposition, Exhibits.....	13-15
Defendant's Reply Affirmation.....	16

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as follows:

Plaintiff alleges that on August 24, 2009, plaintiff Tomas Plata ("Plaintiff"), a roofing worker, sustained personal injuries when he fell from a ladder at Parkway Village, Apartment 52B, Jamaica, New York (Ex. A). It is alleged that defendant was the agent for the owner of Parkway Village and controlled the subject building (Ex. A). Plaintiff's employer, J.F. Reidy and Sons Roofing, was performing roofing work at the subject building at the time of plaintiff's accident on behalf of defendant (Ex. F, p. 13-14). Plaintiff alleges he was climbing the ladder, saw a tile falling toward him, and that he "moved to the right and the ladder moved to the left" (Ex. E, p. 73, 64, 70). The tile did not hit plaintiff, but plaintiff fell off the ladder to the ground (Ex. E, p. 76-77). Plaintiff moves for summary judgment based on defendant's alleged violation of Labor Law §240(1).

Labor Law § 240(1) provides, in pertinent part: "All 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". (see, Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280 [2003]).

The duty imposed upon contractors and owners pursuant to Labor Law § 240(1) is non-delegable (see, Rocovich v Consolidated Edison Co., 78 N.Y.2d 509 [1991]), and a violation of the duty results in absolute liability. (see, Wilinski v. 334 East 92nd Housing Development Fund, 18 N.Y.3d 1 [2011]; Bland v Manocherian, 66 N.Y.2d 452 [1985]; Jamindar v. Uniondale Union Free School Dist., 90 A.D.3d 612 [2 Dept. 2011]; Paz v. City of New York, 85 A.D.3d 519 [1 Dept. 2011]). "[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense" (Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35, 39 [2004}). Comparative negligence is not an issue which can be raised by a defendant in a claim based on Labor Law §240(1) (see, Zimmer v. Chemung County Performing Arts, Inc., 65 N.Y.2d 513 [1985]; Bland v Manocherian, supra). A defendant cannot avoid liability unless the plaintiff worker's own actions were the sole proximate cause of the accident (Cahill v. Triborough Bridge and Tunnel Authority, supra; Blake v. Neighborhood Housing Services of New York, supra; Tweedy v. Roman Catholic Church of Our Lady of Victory, 232 A.D.2d 630 [2 Dept. 1996]).

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (Lopez v. Beltre, 59 A.D.3d 683, 685 [2 Dept. 2009]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted]" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957]; see also, Rotuba Extruders v.Ceppos, 46 N.Y.2d 223 [1978]; Andre v. Pomeroy, 35 N.Y.2d 361 [1974]; Stukas v. Streiter, 83 A.D.3d 18 [2 Dept. 2011]; Dykeman v. Heht, 52 A.D.3d 767 [2 Dept. 2008]; Kolivas v. Kirchoff, 14 A.D.3d 493 [2 Dept. 2005]). Summary judgment "should not be

granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Benetatos v. Comerford, 78 A.D.3d 750 [2 Dept. 2010]; Scott v. Long Island Power Auth., 294 A.D.2d 348, 348 [2 Dept. 2002]).

Labor Law §240(1) protects a worker from "specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured ...." (Ross v Curtis Palmer Hydro-Electric Company, 81 N.Y.2d 494, 501 [1993}). The harm must flow "directly ... from the application of the force of gravity to an object or person" (Ross v Curtis Palmer Hydro-Electric Company, supra, 501).

In order to prove a cause of action arising under Labor Law §240(1), a plaintiff must show that a violation of the statute occurred and that the violation was a proximate cause of his injury (see, Cahill v Triborough Bridge & Tunnel Auth., supra; Blake v Neighborhood Hous. Servs. of N.Y. City, supra; Rudnik v Brogor Realty Corp., 45 A.D.3d 828 [2 Dept. 2007]; Nelson v. Ciba-Geigy, 268 A.D.2d 570 [2 Dept. 2000]). For a cause of action based on Labor Law §240(1), "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599, 603 [2009]; Wilinski v. 334 East 92nd Housing Development Fund, supra). "The fact that a worker is injured while working above ground does not ipso facto mean that the injury resulted from an elevation-related risk contemplated by section 240(1) of the Labor Law." (Striegel v. Hillcrest Heights Development Corp., 100 N.Y.2d 974, 977 [2003]).

Plaintiff has failed to prove the causal nexus between his injury and a lack or failure of a safety device prescribed by Labor Law §240(1) (see, Wilinski v. 334 East 92nd Housing Development Fund, supra; Torres v. Perry Street Development Corp., 104 A.D.3d 960 [2 Dept. 2013]). The record fails to demonstrate that the accident was a direct consequence of the lack of safety devices (see, McCallister v. 200 Park, LLP, 92 A.D.3d 927 [2 Dept. 2012]) and the disparities in the evidence presented by plaintiff present triable issues of fact as to how this accident happened (see, Hernandez v. Ten Ten Co. 31 A.D.3d 333 [1 Dept. 2006]) and are not so minor or immaterial as to warrant the granting of summary judgment to plaintiff (see, Figueroa v. Mishko, 242 A.D.2d 521 [2 Dept. 1997]). Further, plaintiff sustained his injury while using one of the protective devices listed by Labor Law §240(1), i. e., a ladder, and that

protective device was not shown by plaintiff to have been inadequate to prevent injuries from the hazard of gravity.

"[T]he 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 demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 [1986}). Plaintiff has failed to sustain this burden. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 [1988]; Alvarez v. Prospect Hosp., supra; Winegrad v. New York Med. Ctr., 64 N.Y.2d 851 [1985]).

On plaintiff's motion for summary judgment, the evidence should be liberally construed in a light most favorable to defendant (see, Nash v. Port Washington Union Free School Dist., 83 A.D.3d 136 [2 Dept. 2011]; Pearson v. Dix McBride, LLC, 63 A.D.3d 895 [2 Dept. 2009]). Further, the facts alleged by the non-moving party, and the inferences that may be drawn therefrom, must be accepted as true (see, Doize v. Holiday Inn Ronkonkoma, 6 A.D.3d 573 [2 Dept. 2004]). Based on the evidence submitted, questions of fact exist as to how this accident occurred and as to whether any further protective devices under Labor Law §240(1) were necessary for the work being performed by plaintiff, which would subject defendant to liability under Labor Law §240(1) (see, Shi v. Zhang, 76 A,D,3d 558 [2 Dept. 2010]).

As such, plaintiff has failed to tender sufficient evidence to show the absence of any material issue of fact and the right to summary judgment as a matter of law (see, Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 N.Y.2d 851 [1985]; Bridges v. Wyandanch Community Development Corp., 66 A.D.3d 938, 940 [2 Dept. 2009]; Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corporation, 64 A.D.3d 85 [2 Dept. 2009]).

Defendant cross-moves to dismiss plaintiff's complaint. On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see, Leon v. Martinez, 84 N.Y.2d 83 [1994]) and plaintiff is to be accorded the benefit of every possible inference (see, Cueto v. Hamilton Plaza Co., Inc., 67 A.D.3d 722 [2 Dept. 2009]). Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (see, Gaidon v. Guardian Life Ins. Co. Of America, 94 N.Y.2d 330 [1999]). The Court must find plaintiff's complaint to be legally sufficient if it finds that

plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, Hoag v. Chancellor, Inc., 246 A.D.2d 224 [1 Dept. 1998]).

In determining whether plaintiff's complaint states valid causes of action, the Court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (see, 219 Broadway Corp. v. Alexanders, Inc., 46 N.Y.2d 506 [1979]; Tougher Industries, Inc. v. Northern Westchester Joint Water Works, 304 A.D.2d 822 [2 Dept. 2003]).

On a motion to dismiss the complaint, pursuant to CPLR §3211(a)(7), for failure to state a cause of action, a single legally sufficient cause of action requires denial of the entire motion (see, Advance Music Corp. V. American Tobacco Co., 296 N.Y. 79 [1946]; Paulsen v. Paulsen, 148 A.D.2d 685 [2 Dept. 1989]). Here, the First Cause of Action of the verified complaint (Ex. A), contains sufficiently particular factual details to demonstrate the material elements of the alleged negligence on the part of the defendant (see, Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer, 8 N.Y.3d 438 [2007]; Bd of Managers of Bay Club v. Borah, Goldstein, Schwartz, Altschuler & Nahins, P.C., 97 A.D.3d 612 [2 Dept. 2012]). As such, defendant's motion seeking dismissal of the complaint herein is denied.

The parties remaining arguments and contentions either are without merit or need not be addressed in light of the foregoing determination.

This Constitutes the Decision and Order of the Court.

Dated: August , 2013

Denise J. Butler, J.S.C.