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SCANNED ON 7/14/2014

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

PRESENT: SHLOMO HAGLER J.S.C. PART 17

Justice

Index Number : 116229/2009
ZAPATA, LEON D.
vs.
41 MADISON
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 14 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/14

SHLOMO HAGLER, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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LEON D. ZAPATA,

Plaintiff,

-against-

41 MADISON L.P.,

Defendant.

----------x

Index No.: 116229/09



41 MADISON L.P.,

Third-Party Plaintiff,

-against-

PAR ENVIRONMENTAL CORPORATION,

Third-Party Defendant.

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Third-Party Index No: 590273/10

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

In this personal injury action, plaintiff Leon D. Zapata (" Zapata" or "plaintiff") moves for an order pursuant to CPLR § 3212 for partial summary judgment in his favor on his Labor Law § 240 (1) claim as against defendant 41 Madison L.P. ("Madison" or "defendant"). Madison opposes the motion.

## BACKGROUND

Plaintiff, an asbestos removal worker, commenced this action to recover damages for personal injuries he sustained on July 6, 2006, when he fell from a scaffold while working at a construction project located at 41 Madison Avenue, New York, New York (the "subject premises"). On the date of the accident, Madison was the owner of the subject premises where

the accident occurred. Plaintiff's employer, third-party defendant Par Environmental Corporation ("Par"), was retained to perform asbestos abatement work at the subject premises.

**Plaintiff's Deposition Testimony**

Plaintiff testified that, on the day of the accident, he was performing asbestos removal work at the subject premises for his employer, Par. Plaintiff maintained that his work was solely supervised by his Par supervisor and a Par foreman.

At the time of the accident, plaintiff intended to remove asbestos from the ceiling of one of the floors of the subject premises. In order to perform his work, plaintiff was provided with a four-wheel Baker scaffold. Before climbing onto the scaffold, plaintiff attempted to lock the scaffold wheels by pressing down on them with his foot, but "three of them didn't lock for [him]" (Exhibit "C" to the Affirmation of John M. Shaw, Esq., dated December 26, 2012 ["Shaw Aff."], in support of plaintiff's motion at p. 87). Plaintiff described the scaffold as neither having any safety railings, nor safety netting in place in the event of a fall. In addition, although plaintiff was provided with a harness and rope, there were no anchors for him to tie off on the scaffold.

In order to reach the wooden platform of the scaffold (the "platform") to begin his work, plaintiff had to climb up a three or four-rung ladder (the "ladder"), which was attached to the side of the scaffold. The platform steps were wet because the Par workers used a water hose to moisten the asbestos in order to make it easier to remove.

Plaintiff testified that he climbed up the ladder two times prior to the accident. The first time he climbed the ladder, plaintiff noticed that it moved in a forward motion. The accident occurred as plaintiff climbed up the ladder the second time. Plaintiff explained that, while one of

his feet was on the platform and the other foot was still on one of the ladder rungs, the scaffold suddenly moved and shifted, causing him to fall to the concrete floor below.

Specifically, when plaintiff was asked at his deposition if he had reached the platform when the accident occurred, plaintiff replied, "I was about to arrive when the scaffolding moved" (*id.* at 80). When asked to describe how the scaffold moved, plaintiff replied, "It moved for me like it was throwing itself, like towards the side" (*id.* at 82). Plaintiff also testified that "when [the scaffold] moved for me, that's when I fell" (*id.* at 96). When he was asked why he thought the scaffold moved, plaintiff replied, "Yes, it did move and that was because the wheels did not have - - were not locked" (*id.* at 98). Plaintiff also testified that his foot slipped off the ladder, "[b]ecause of the pipe . . . and you are taped up" (*id.* at 112-113). Plaintiff further explained that, at the direction of his supervisor, plaintiff taped around his shoes in order to hold a "booty" on (*id.* at 113).

It should be noted that plaintiff's description of the events leading up to the accident, as set forth in his deposition testimony, are also similarly reflected in his affidavit, sworn to on November 12, 2012. (Exhibit "B" to the Shaw Aff.).

## DISCUSSION

### Summary Judgment

"'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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to

raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

**Plaintiff's Labor Law § 240 (1) Claim Against Defendant Madison**

Plaintiff moves for partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against Madison. Labor Law § 240 (1), also known as the Scaffold Law, provides, in relevant 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."

"'Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . 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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

"Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use,

or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807 [1st Dept 2010] ["a distinction must be made between those accidents caused by the failure to provide a safety device required by Labor Law § 240 (1) and those caused by general hazards specific to a workplace"]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards such as falling from a height, and must be liberally construed to accomplish the purpose for which it was framed [internal citations omitted]" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John v Baharestani*, 281 AD2d at 117, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 500).

To prevail on a Labor Law § 240 (1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, Labor Law § 240 (1) applies to the facts of this case because plaintiff was subjected to an elevation-related risk when he climbed up the ladder of the scaffold in anticipation of performing asbestos removal work on the platform. As the scaffold at issue was inadequately secured so as to protect plaintiff while subject to an elevation-related risk, and no

other safety devices were provided to him, Madison is liable for his injuries under Labor Law § 240 (1) (*see Peralta v American Tel. and Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] [unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided, warranted a finding that the owners were liable under Labor Law § 240 (1)]; *Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598, 598 [2d Dept 2005]).

As plaintiff argues, since only one of the scaffold's three wheels properly locked, the scaffold was unsafe because it was not properly secured against movement.[1] In addition, plaintiff clearly testified that he fell from the scaffold after it "moved" (Exhibit "C" to Shaw Aff. at 80). "[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 289). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]).

In opposition to plaintiff's motion, Madison asserts that it is not liable for plaintiff's injuries under Labor Law § 240 (1), because a question of fact exists as to whether plaintiff was the sole proximate cause of his injuries. To that effect, Madison sets forth plaintiff's testimony that he not only climbed up and then down the shaky ladder once before the accident, but that he

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[1] It should be noted, however, that plaintiff's argument that the scaffold was unsafe, because the scaffold's platform lacked guardrails, a place to tie a harness off to and a life net, is of no moment, as plaintiff had not yet reached the platform at the time of the accident. Rather, plaintiff testified that he was still in the process of climbing the ladder to the platform, when the scaffold moved, causing him to fall. Therefore, the lack of these safety devices could not have been the proximate cause of the accident.

was also aware that three of the four wheels of the scaffold did not lock properly. Therefore, if, in fact, the unlocked wheels were the cause of the accident, then issues of fact exist as to whether plaintiff's negligence in utilizing the ladder, while armed with this knowledge, was the proximate cause of the accident. "When the defendant presents some evidence that the device furnished was adequate and properly placed and that the conduct of the plaintiff may be the sole proximate cause of his or her injuries, partial summary judgment on the issue of liability will be denied because factual issues exist" (*Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 1188 [3d Dept 2007]).

For the purposes of Labor Law § 240 (1), it is not a defense that plaintiff utilized the scaffold despite knowing that three of the four scaffold wheels were defective, as the onus was not on plaintiff to provide himself with a safe scaffold. "[T]he duty to see that safety devices are furnished and employed rests on the employer in the first instance" (*Aragon v 233 W. 21st St.*, 201 AD2d 353, 354 [1st Dept 1994]).

In addition, Madison has not demonstrated that this is a case of a recalcitrant worker, wherein a plaintiff was specifically instructed to use a safety device and refused to do so (*see Olszewski v Park Terrace Gardens*, 306 AD2d 128, 128-129 [1st Dept 2003]; *Morrison v City of New York*, 306 AD2d 86 [1st Dept 2003]; *Crespo v Triad, Inc.*, 294 AD2d 145, 147 [1st Dept 2002]; *Sanango v 200 E. 16th St. Hous. Corp.*, 290 AD2d 228 [1st Dept 2002]). Here, there is no evidence in this record that plaintiff was instructed not to use the scaffold when the wheel locks were not working, or when the scaffold seemed unstable.

Madison also argues that plaintiff is not entitled to partial summary judgment in his favor on the Labor Law § 240 (1) claim because plaintiff alleged different versions of how the accident

occurred, thus creating issues of fact as to the cause of the accident. For example, in addition to testifying that he fell when the scaffold moved, plaintiff testified that he fell when his foot slipped, due to tape that he had put on his shoes at the direction of his supervisor.

Here, as Madison did not put forth sufficient evidence to refute plaintiff's assertion that the fall occurred, first and foremost, because the scaffold moved, Madison did not raise a bona fide issue of fact as to how the accident occurred (*see Pineda v Kechek Realty Corp.*, 285 AD2d 496, 497 [2d Dept 2001]; *Hauff v CLXXXII Via Magna Corp.*, 118 AD2d 485, 486 [1st Dept 1986]). In any event, "[a] lack of certainty as to exactly what preceded plaintiff's fall to the floor below does not create a material issue of fact here as to proximate cause" (*Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005] [where either defective or inadequate protective devices constituted the proximate cause of the plaintiff's accident, it did not matter whether the plaintiff's fall was the result of the scaffold tipping over or was whether it was the result of plaintiff misstepping off its side]).

Further, plaintiff's conduct in using a scaffold allegedly known to be defective goes to the issue of comparative fault which is not a defense to a Labor Law § 240 (1) cause of action, because the statute imposes absolute liability once a violation is shown (*Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004] ["Given an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries"]).

Where "the owner or contractor fails to provide adequate safety devices to protect workers from elevation-related injuries and that failure is *a* cause of plaintiff's injury, the negligence, if any, of the injured worker is of no consequence [internal quotation marks and

citations omitted]" (*Tavarez v Weissman*, 297 AD2d 245, 247 [1st Dept 2002]; *see Ranieri v Holt Constr. Corp.*, 33 AD3d 425, 425 [1st Dept 2006] [Court found that failure to supply plaintiff with a properly secured ladder or any safety devices was a proximate cause of his fall, and there was no reasonable view of the evidence to support defendants' contention that plaintiff was the sole proximate cause of his injuries]; *Lopez v Melidis*, 31 AD3d 351, 351 [1st Dept 2006]; *Torres v Monroe Coll.*, 12 AD3d at 262 [Court noted that even if another cause of the accident was plaintiff's own improper use of an unopened A-frame ladder leaned against the wall from atop the scaffold, defendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident]).

Thus, plaintiff is entitled to partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendant Madison.

**Whether Plaintiff's Motion Is Defective**

Madison argues that plaintiff did not meet his burden, because his motion, which relies on deposition transcripts that were not properly signed and executed, is defective. Madison's argument that plaintiff's motion is defective fails. Initially, Madison neither disputes the authenticity nor the accuracy of the transcripts (*see Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013] [where the plaintiff did not challenge the accuracy of the deposition transcript, which was certified by the reporter, it was deemed admissible], citing *Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443, 443 [1st Dept 2012]). Also, in addition to the deposition transcripts, plaintiff also submitted a properly notarized and translated affidavit with his motion, which reflects the events as they were described in plaintiff's testimony.

Moreover, a review of the record reveals that plaintiff's counsel sent Madison's counsel a copy of the transcript of Madison's witness, Paul Faust, the building manager for the subject premises. To date, said transcript has not been signed and sent back to plaintiff's counsel's office. CPLR 3116 (a) requires that, if an opponent refuses or fails to sign his or her transcript within 60 days, the transcript may be used by the other party as if signed (*Franzese v Tanger Factory Outlet Ctrs., Inc.*, 88 AD3d 763,763 [2d Dept 2011]; *Thomas v Hampton Express*, 208 AD2d 824, 824 [2d Dept 1994]).

Finally, as to the transcript of plaintiff's deposition testimony, not only did Madison serve a copy of said deposition on plaintiff, Madison relied on it in its opposition (*see Pavane v Marte*, 109 AD3d 970, 970 [2d Dept 2013] [unsigned excerpts of deposition testimony were deemed admissible, because "they were submitted by the party deponents themselves and, accordingly, those transcripts were adopted as accurate by those deponents"]). Therefore, under the circumstances, the subject deposition testimonies are in admissible form (*Franzese v Tanger Factory Outlet Ctrs. Inc.*, 88 AD3d at 764).

## CONCLUSION

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff Leon D. Zapata's motion, pursuant to CPLR 3212, for partial summary judgment in his favor on the Labor Law § 240 (1) claim against defendant Madison 41 L.P. is granted; and it is further

**ORDERED** that the remainder of the action shall continue.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: July 9, 2014
New York, New York

Hon. Shlomo S. Hagler, J.S.C.