SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ALBERTO DICEMBRINO and STEFANI DICEMBRINO,

Plaintiffs,

-against-

VERIZON NEW YORK INC., 435 WEST 50 PROPERTY OWNER, L.P., and ARROW ALLIANCE CONSTRUCTION CORP.,

Defendants.

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VERIZON NEW YORK INC., 435 WEST 50 PROPERTY OWNER, L.P., and ARROW ALLIANCE CONSTRUCTION CORP.,

Third-party plaintiffs,

-against-

JAMES F. VOLPE ELECTRIC CO.,

Third-party defendant.

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Index No. 161670/14

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiffs:	**For defendants:**	**For third-party defendant:**
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Daneil J. McKenna, Esq., PC	Cullen & Dykman LLP	Milber Makris *et al.*
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White Plains, NY 10601	New York, NY 10005	White Plains, NY 10601
914-686-0500	212-732-2000	914-681-8700

By notice of motion, plaintiffs move pursuant to CPLR 3212 for an order summarily granting them judgment on the issue of liability on their Labor Law § 240(1) claim. Defendants and third-party defendant oppose.

I. PERTINENT FACTS

Defendant Verizon New York Inc. (Verizon), owner of a building in Manhattan, hired defendant Arrow Alliance Construction Group (Arrow) as general contractor to perform renovation work as part of a condominium conversion of the building. Arrow hired third-party defendant, who employed plaintiff Alberto DiCembrino to install a new smoke detection system. (NYSCEF 28, 35).

By deed recorded July 7, 2011, Verizon sold a portion of the premises (unit A) to nonparty 435 West 50th LLC, who, by deed recorded July 31, 2012, transferred it to defendant 435 West 50 Property Owner, L.P. (435 West). Verizon retained ownership of the basement. (NYSCEF 29-32).

On August 16, 2012, plaintiff was injured while working on a 12-foot A-frame ladder in the building's basement. He reported the incident three days later to third-party defendant's foreman, for whom he then prepared an accident report reflecting that the accident occurred when he was "coming off the ladder [and] missed the last step." (NYSCEF 53).

On November 24, 2014, plaintiffs commenced this action, asserting claims of negligence, negligent hiring, violations of Labor Law §§ 200, 240(1), and 241(6), and a derivative claim for loss of services. (NYSCEF 1). On August 6, 2016, defendants commenced a third-party action against third-party defendant sounding in contractual and common-law indemnification. (NYSCEF 12).

At his August 4, 2015 deposition, plaintiff explained that at the time of the accident, he was working alone at the top of a 12-foot A-frame ladder, pulling cable through a conduit, or pull-box, located three to four feet below the ceiling, lubricating the cable and feeding it through

a pipe. No one held the ladder while he worked and it had no rubber treads on its base. After approximately an hour, plaintiff descended the ladder carrying a five-gallon bucket of lubricant. He fell when he missed the fourth rung from the bottom. He testified as follows:

> Q. Do you know what caused you to miss a step?
>
> A. Debris on the ladder.
>
> Q. What was the debris?
>
> A. The debris was when we were pulling, if I could explain, the existing wire that was there was old asbestos wire, so we had to cut it and pull it out, and the insulation, the asbestos remained in the pipe, so when we pulled the new wire through, as the nose was coming out all the debris came out, which was asbestos, insulation, whatever was 100 years old in the pipe came out.
>
> . . . .
>
> Q. And it came out and some of it landed on the ladder?
>
> A. It landed in my hair, it was all over the ladder, yeah.
>
> Q. Were you aware while you were doing this work on the ladder that some of the what you're calling the debris was landing on the ladder?
>
> A. While it was happening, yes, I didn't expect it though.
>
> . . . .
>
> Q. This debris, what exactly was it that you believe was on that step, you're talking about asbestos, but describe what exactly it is?
>
> A. Well, it's asbestos, it was also an old ladder, it had some monocoat on it, also the soap I was using was, some of it, a lot of it spills out and usually it's all over the floor, but some hit the ladder.

(NYSCEF 28).

No one else witnessed the accident. Plaintiff testified that he told the foreman about the accident the next day on the job and that he filled out an accident report at the foreman's direction. He also testified that weekly safety meetings were held on site where it was mentioned

that the ladders used for the project were old. (*Id.*).

On February 3, 2016 at oral argument, plaintiffs' counsel indicated that while 435 West did not belong in the case, he preferred that the case be dismissed as against it. (NYSCEF 57 at 10-11).

II. DISCUSSION

A. Contentions

Plaintiffs allege that defendants violated Labor Law § 240(1) by failing to provide plaintiff with adequate protection from elevation-related risks when he fell from a ladder that was unstable, non-treaded, and covered in debris. They argue that it is irrelevant that plaintiff was the only witness to his accident, as are any minor discrepancies in his account as it is undisputed that his injuries were caused by his fall. (NYSCEF 23, 37). In his September 10, 2015 affidavit accompanying their motion, plaintiff substantially corroborates his deposition testimony, adding that there were no "non-slip treads" on the ladder, which "wobbled," precipitating his fall, and that he reported the incident to third-party defendant the same day. (NYSCEF 24).

In response, defendants argue that plaintiffs' motion is premature absent depositions of the foreman or another employee of third-party defendant, and that in any event, the foreman's affidavit and plaintiff's accident report are inconsistent with plaintiff's testimony, thereby raising issues about how the accident occurred. They also dispute that the work performed by plaintiff is protected under section 240(1). (NYSCEF 45).

Defendants offer the affidavit of third-party defendant's foreman, who attests that, several days after the accident, plaintiff informed him that "he missed a step while coming down the ladder," and that he neither mentioned nor complained about the condition of the ladder. The

foreman stated that, to the best of his knowledge, all ladders at the site were in good condition. (NYSCEF 45, 47).

By separate opposition, third-party defendant also claims that the motion is premature absent defense depositions and third-party discovery, that plaintiffs' submissions are fatally self-serving, and that plaintiffs exclusively possess facts necessary to oppose their motion. It reiterates that the discrepancies in plaintiff's testimony preclude summary judgment, as a triable issue exists as to whether plaintiff's own actions proximately caused his fall. (NYSCEF 50).

In reply, plaintiffs contends that the work performed at the time of the accident comes within section 240(1), and that defendants' conclusory assertion to the contrary does not raise a triable issue. They reiterate that Verizon was the owner, acted in the capacity of owner, and controlled the space within which plaintiff worked. (NYSCEF 54).

Plaintiffs deny that the motion is premature, and observes that defendants give no indication of what further discovery might reveal, that both defendants and third-party defendant have had an opportunity to depose plaintiff and request discovery from them, and that any discovery pursued by third-party defendant relates only to indemnification. They note that defendants do not dispute plaintiff's testimony, and argue that the account of the accident reflected in the accident report is consistent with plaintiff's testimony, and that any discrepancies are immaterial as, by both accounts, his injuries were caused by a fall from a ladder. Moreover, they deny that plaintiff was the sole proximate cause of his own injuries absent evidence that he misused the ladder, and maintain that the foreman does not contradict plaintiff's testimony, as he does not address the condition of the ladder based on personal knowledge. (*Id.*).

B. Analysis

1. Governing standard

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

2. Labor Law § 240(1) claim

Labor Law § 240(1) provides, in pertinent part, that

> [a]ll contractors and owners and their agents, . . . in the erection, demolition, repair, 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, . . . ladders, . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

"Altering," within the meaning of section 240(1), requires "making a significant physical change to the configuration or composition of the building or structure." (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *Lannon v 356 W. 44th St. Rest., Inc.*, 136 AD3d 528, 528-529 [1st Dept 2016]).

The statute, which is liberally construed for the accomplishment of its purpose (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]), imposes absolute liability on building owners and their agents for workplace injuries (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 n.4 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 519 [1985]). It was "designed to prevent those types of

accidents in which the . . . ladder . . . proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross*, 81 NY2d at 501; *Verdon v Port Auth. of New York & New Jersey*, 111 AD3d 580, 581 [1st Dept 2013]).

Here, it is undisputed that Verizon owned the building and Arrow was the general contractor for the project, that each exercised authority over and directed the work in the portion of the premises where plaintiff was injured, and that plaintiff was injured while using an statutorily enumerated safety device. Plaintiffs also establish that the work in which plaintiff was engaged, pulling, lubricating, and feeding cable as part of the installation of a smoke detection system, is protected under the statute. (*See Kochman v City of New York*, 110 AD3d 477, 478 [1st Dept 2013] [running new wires through roof into room where new circuit would be installed constituted alterations]; *Weininger v Hagedorn & Co.*, 241 AD2d 363, 364 [1st Dept 1997], *revd on other grounds* 91 NY2d 958 [1998] [running wiring through holes in ceiling constituted alterations or repairs within meaning of section 240(1)]; *Tate v Clancy-Cullen Stor. Co., Inc.*, 171 AD2d 292, 295 [1st Dept 1991] [affixing fire alarm tubing to structural portion of building deemed "in the nature of 'altering' or 'repairing'" within meaning of section 240(1)]; *cf. Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430, 433 [1st Dept 2007] [splicing fiberoptic cable with existing cable did not constitute alternations, notwithstanding plaintiff's characterization of work as "installing a new and enhanced fiber optic telephone system"]). However, given plaintiff's counsel's representations at oral argument, 435 West is not an owner or contractor within the meaning of the Labor Law.

To establish a claim under Labor Law § 240(1), the plaintiff must show both a statutory

violation and that the "violation . . . was a contributing cause of his fail." (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 289 [2003]; *Nazario v 222 Broadway, LLC*, 135 AD3d 506, 507-508 [1st Dept 2016]). The statutory violation occurs not only when a safety device malfunctions, but when the safety device provided does not operate so as to give proper protection. (*Harris v City of New York*, 83 AD3d 104, 111 [1st Dept 2011]).

While a defendant who violates the statute cannot raise as a defense the plaintiff's own negligence, there is no liability where there is no violation of the statute, in that the device is "so constructed, placed and operated as to give proper protection to a person so employed," and the plaintiff's own negligence is the sole proximate cause of his accident. (*O'Brien v Port Auth. of New York*, 131 AD3d 823, 826 [1st Dept 2015], *citing Blake*, 1 NY3d at 290).

Plaintiff's testimony and affidavit, the facts of which defendants do not dispute, demonstrate that he was injured when he fell from a ladder that was wobbly, unsecured, and not appropriately treaded, thereby exposing him to a gravity-related risk. (*See Ocana v Quasar Realty Partners L.P.*, 137 AD3d 566, 567 [1st Dept 2016] [plaintiff's testimony that ladder "wobbled" before his fall satisfied *prima facie* burden]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 494-495 [1st Dept 2004] [plaintiff established liability under section 240(1) with testimony that ladder wobbled and swayed, that it had no side rails for gripping, and was covered in slippery substance]). While plaintiff's testimony that he spilled lubricant and caused debris to fall on the steps of the ladder supports an inference that he partly caused his fall, his comparative negligence is immaterial. (*Cf. Nazzario*, 135 AD3d at 508-509 [to extent plaintiff negligent by failing to wear protective gloves when he was electrocuted and fell from unsecured ladder, no defense in light of defendants' violation of section 240(1)]; *Goreczny v 16*

Ct. St. Owner LLC, 110 AD3d 465, 465 [1st Dept 2013] [that plaintiff may have chosen wrong type of ladder immaterial as comparative negligence irrelevant]). Thus, plaintiffs establish, *prima facie*, that defendants failed to provide proper protection to plaintiff for work involving a gravity-related risk, and thereby proximately caused his injuries.

In his accident report and in the account of the accident he gave to the foreman, plaintiff states only that he missed a step, and does not attribute the accident to any failing or defect of the ladder or absence of safety devices, thereby raising an issue as to whether his own careless conduct constituted the sole proximate cause of his injuries. (*See Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 1098 [2d Dept 2012] [defendants raised triable issue about whether plaintiff's action was sole proximate cause of his fall by offering accident reports wherein plaintiff did not indicate that ladder "kicked out," as reflected in his later testimony, but rather that he lost his footing or balance and fell]; *Antenucci v Three Dogs, LLC*, 41 AD3d 205, 205 [1st Dept 2007] [although plaintiff testified that ladder "wobbled" preceding his fall, accident report reflected that he "missed a wrung (and) then fell off," thereby precluding summary judgment]; *see also D'Antonio v Manhattan Contr. Corp.*, 93 AD3d 443, 444 [1st Dept 2012] [conflicting evidence as to whether plaintiff jumped from ladder, was knocked off by pipe, or lost footing, precluding summary judgment]).

Given this result, I need not address defendants' remaining contentions.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order granting them summary judgment on the issue of liability on their claim pursuant to Labor Law § 240(1) is denied; and it is further

ORDERED, that the complaint is dismissed and severed as to defendant 435 West 50 Property Owner, L.P.

ENTER:

Barbara Jaffe, JSC

DATED: May 25, 2016
New York, New York