| **Scrocco v 150 Charles St. Holdings LLC** |
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| October 28, 2016 |
| Supreme Court, New York County |
| Docket Number: 160383/13 |
| Judge: Barbara Jaffe |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ANTONIO SCROCCO and PATRICIA SCROCCO,

Plaintiffs,

-against-

150 CHARLES STREET HOLDINGS, LLC and PLAZA CONSTRUCTION CORP.,

Defendants.

----------x

Index No. 160383/13

Motion seq. nos. 002, 003

**DECISION AND ORDER**

BARBARA JAFFE, J.

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By notice of motion, plaintiffs move pursuant to CPLR 3212 for an order granting them partial summary judgment on the issue of liability on their Labor Law § 240(1) claim. Defendants oppose. (Mot. seq. no. 002).

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiffs oppose. (Mot. seq. no. 003).

The motions are consolidated for disposition.

## I. BACKGROUND

### A. Undisputed facts

This action arises from a gravity-related accident that occurred at a building under construction in Manhattan. Premises owner, defendant 150 Charles Street Holdings, LLC, hired defendant Plaza Construction Corp. as the general contractor to perform renovation work.

Plaintiff Antonio Scrocco was employed as a bricklayer by a nonparty subcontractor, Navillus Contracting. (NYSCEF 57).

On the day of the accident, Scrocco was instructed by his supervisor to lay bricks along a third floor exterior wall between two openings cut into the wall for windows. He retrieved a safety harness and ascended a scaffold suspended along the third floor, but did not have with him the equipment for anchoring the harness. The scaffold had guardrails on all sides except the side abutting the building facade.

Scrocco stepped off the scaffold onto the edge of one of the openings; his other foot remained on the scaffold. He slipped on waterproofing paper that covered the bottom of the opening, falling head-first through it, striking the ground, and sustaining injuries. (NYSCEF 57, 69).

B. Deposition testimony

In addition to the undisputed facts set forth above (I.A.), Scrocco testified at a deposition held on May 12, 2015, that he told his foreman that the harness had no tie-off, and that although the foreman agreed to get one for him, he did not wait for it, but commenced work. The foreman never returned with the part, Scrocco asked no one else to get it for him, he did not inform the safety supervisor that the part was missing, nor did he ask the supervisor for the missing part or another harness. Scrocco estimated that base of the scaffold was 12 inches higher than the bottom edge of the opening, and he admitted having seen the waterproof paper that was wrapped around the edge when he started work that day. The scaffold did not shift or move before his fall, nor did it break or malfunction. (NYSCEF 61).

Testifying on July 24, 2015, on behalf of Plaza, Robert Marrone testified, as pertinent

here, that he believed that Scrocco's employer, whose duty it was to provide Scrocco with the tie-off, thought that Scrocco had used the scaffold incorrectly. And according to Marrone, guardrails were not needed on the side of the scaffold abutting the building. (NYSCEF 63).

By affidavit dated January 15, 2016, Scrocco stated that "[w]hile I was not asked at my deposition how far I fell, after I slipped on the green waterproof paper, I fell through the window a few feet to the concrete floor below." (NYSCEF 65).

By affidavit dated January 18, 2016, Paddy Mills, Navillus's site safety director responsible for performing site safety audits at the time of Scrocco's accident, states that before the accident, he observed Scrocco working on the scaffold, which was approximately 50 inches above the edge of the window opening and had railings on all open sides, and that there was little or no space between the scaffold and the facade. Mills also saw that Scrocco wore a safety harness with a safety line attached, and that he was standing on the edge of the window opening which was covered with waterproof paper. Mills thus stopped Scrocco and told him to get off the edge of the opening, calling his attention to the possibility of falling on the paper, reprimanding him for standing on the edge, and reminding him that his safety harness and tie-off was not designed to protect him from a 20- to 50-inch fall through a window opening. According to Mills, while safety harnesses were provided to and used by workers, they were not designed to protect against a fall like the one Scrocco experienced, and there was no requirement that the scaffold be fitted with protective guardrails for openings into which one could fall less than six feet. He also claims that it was unsafe and unnecessary for Scrocco to place his foot on the edge, and that the scaffold provided adequate protection. (NYSCEF 70).

Plaintiffs' expert, Kathleen Hopkins, a certified site safety manager, states in an affidavit

dated January 19, 2016, that in order to measure the bricks, Scrocco had no choice but to step onto the edge of the window opening, and that the opening should have been covered or fitted with safety railings, or there should have been a railing on the side of the scaffold abutting the facade. She also opines that Scrocco should have been provided with a complete safety harness. (NYSCEF 57).

By affidavit dated March 24, 2016, Bernard Lorenz, a professional engineer, states that based on his review of the evidence, including Hopkins's affidavit, he observes that while the New York Industrial Code requires guard or safety rails on open sides of scaffold platforms, no rails are required for a scaffold placed at an elevation of less than seven feet, and that pursuant to the pertinent provisions of the Occupational Health and Safety Administration governing bricklaying, a guardrail is not required on the side of a scaffold abutting the wall on which bricks are being laid. Lorenz denies that defendants violated any applicable Code provisions or that any rule or regulation requires protection for falls from heights such as Scrocco's, and opines that Scrocco was provided with adequate protection from an elevation-related risk as the scaffold allowed him to work safely. Thus, he asserts, Scrocco needed no safety harness, and was the sole cause of the accident. (NYSCEF 71).

Scrocco states, in a second affidavit, dated March 24, 2016, that the only way he could measure the wall was to step into the window opening, and he denies that Mills or anyone else reprimanded him or directed him to do his work otherwise. (NYSCEF 74).

## II. PARTIES' MOTIONS ON LABOR LAW § 240(1) CLAIM

### A. Contentions

In support of their motion for partial summary judgment, plaintiffs argue that in violation

of Labor Law § 240(1), Scrocco was not provided with adequate safety devices and that as a result, he fell from the scaffold through the window opening. He claims that even if the scaffold protected him falling from it, he was not provided with a secondary safety device to protect him from falling through the window opening. (NYSCEF 57).

In opposition to plaintiffs' motion and in support of summary dismissal, defendants contend that Scrocco's own testimony demonstrates that he misused the scaffold by intentionally stepping off to the edge below while leaving his other foot on scaffold, that he had not been instructed to work in that manner, that the site safety director admonished him for stepping off the scaffold, and that his conduct in that regard was a matter of convenience and not necessary to perform the work. Thus, defendants argue that Scrocco was the sole proximate cause of his fall. Although Scrocco denies that the safety director had instructed him not to stand on the edge of the opening, defendants maintain that they need not prove his recalcitrance to establish that his actions were the sole proximate cause of his injuries, and that, in the first instance, there is no violation of section 240(1), as there were adequate guardrails on the scaffold, which was undisputedly without defect. They also assert that Scrocco did not need a safety harness to perform his work safely. (NYSCEF 42).

In response, plaintiffs dispute that Scrocco's work did not require that he step down onto the edge of the window opening to perform his work, given his need to be at a lower level to take proper measurements and the scaffold's position above the bottom of the opening. Scrocco thus alleges that his safety harness should have included a lanyard and rope grab to anchor it. He denies having misused the scaffold, and argues that in any event, having failed to provide him with adequate safety devices in the first instance, defendants proximately caused his fall.

Therefore, his conduct at most constitutes evidence of comparative fault. (NYSCEF 73).

Plaintiffs also ask that the opinion of defendants' expert engineer be disregarded as he has no pertinent qualifications with respect to scaffolds, and that in any event, he inappropriately opines on the standard of care imposed by statute. They moreover assert that whether defendants violated the Industrial Code is immaterial to a section 240(1) claim. (*Id.*).

In reply, defendants argue that even if Scrocco was obliged to step onto the edge of the opening, he could have done so safely, but having stepped onto the waterproof paper with one foot on one level and the other on a lower level, Scrocco engaged in unreasonably dangerous conduct. They also assert that he could have asked other bricklayers on the third floor to obtain the measurements, particularly as some were positioned inside the building. They reiterate that, notwithstanding plaintiffs' experts, Scrocco's own testimony establishes that he was the sole proximate cause of his accident, that no safety harness was required for his work given that the scaffold afforded him proper, adequate protection, and that to the extent a guardrail on the side of the scaffold abutting the wall was required, Scrocco's own testimony reveals that it would have made his work impossible. (NYSCEF 79).

B. Applicable law

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection . . . 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, hangars, 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.

The statute, which is liberally construed (*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 [1993]; *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]). "The policy purpose underlying Labor Law § 240 is to impose a 'flat and unvarying' duty upon the owner and contractor despite any contributing culpability on the part of the worker" (*Bland v Manocherian,* 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), and even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]).

To prevail on a Labor Law § 240(1) claim, a worker must show that he was injured when an elevation-related safety device failed to perform its function to support and secure him from injury. (*Ortega v City of New York*, 95 AD3d 125 [1st Dept 2012]). A defendant will be held liable if it fails to provide workers with adequate protection from reasonably preventable, gravity-related accidents. (*Id.*). The inquiry is not only whether a provided safety device malfunctioned, but also whether it operated so as to give proper protection. (*Harris v City of New York*, 83 AD3d 104 [1st Dept 2011]).

Not every fall at a construction site gives rise to the "extraordinary protections of Labor Law 240(1)." Liability depends on the existence of a hazard contemplated by the statute and the failure to use or inadequacy of a safety device, and there is no liability if the statute is intended to protect against a particular hazard and a hazard of a different kind is the occasion of the injury. (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259 [2001]).

Thus, to establish a violation of section 240(1), a worker must show that the statute was violated and that the violation was a proximate cause of his injuries. (*Blake*, 1 NY3d at 287-288). A fall alone is insufficient to prove that a violation occurred, even a fall from a scaffold. (*Id.*; *see*

*also Beesimer v Albany Ave./Rte. 9 Realty*, 216 AD2d 853 [3d Dept 1995] [mere fact that plaintiff fell from scaffold insufficient to show that scaffold did not prove proper protection]).

When a plaintiff shows, *prima facie*, that an adequate safety device was not provided and that its absence contributed to the injury, the burden shifts to the defendant to show that there is a "plausible view of the evidence" that there was no violation of section 240(1) and that the plaintiff's acts or omissions were the sole proximate cause of the accident. (*Nazario v 222 Broadway, LLC*, 135 AD3d 506 [1st Dept 2016]).

If adequate safety devices are provided and the worker either chooses for no good reason not to use them or misuses them, the worker will be considered the sole proximate cause of his injuries, and the defendant will not be held liable. (*Fernandez v BBD Developers, LLC*, 103 AD3d 554 [1st Dept 2013]). Thus, the sole proximate cause defense applies, in general, when the worker misuses, removes or fails to use an adequate safety device that would have prevented the accident, or knowingly chooses to use an inadequate device despite the availability of an adequate one. (*Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546 [1st Dept 2013]). And there is no violation of the statute if a worker is the sole proximate cause of the accident. (*Blake*, 1 NY3d at 290).

C. Analysis

In *Musselman v Charles A. Gaetano Constr. Corp.*, the plaintiff was working on a scaffold but was unable to lower it to the ground because a truck was in the way. He testified that he saw no other way to exit the scaffold, and thus he aligned it with an open window, stepped onto the sill, and while attempting to climb over a wooden board that had been placed inside the sill, he fell, landing three feet to the floor. The Court affirmed the denial of the

plaintiff's motion for summary judgment on liability, stating that the scaffold did not slip, collapse, or otherwise fail to support him and that the deficiency was the defendants' alleged failure to provide a way for him to return to the ground safely. It also observed that a fall from "essentially the same level" to a lower level is "insufficient to establish that the scaffold did not provide appropriate protection as a matter of law." Questions of fact, however, remained as to whether the placement of the scaffold and maintenance of the area beneath it required the plaintiff to attempt to get off the scaffold in a way that exposed him to an elevation-related hazard which caused his injuries. (277 AD2d 691 [3d Dept 2000]).

Here, as in *Musselman*, the scaffold neither malfunctioned nor, in and of itself, cause Scrocco to fall, and it is undisputed that no rule, regulation or statute required a guardrail on the side of the scaffold abutting a building. Plaintiffs have therefore not demonstrated, *prima facie*, that the scaffold was defective. (*Compare Vasquez-Roldan v Two Little Red Hens, Ltd.*, 129 AD3d 828 [2d Dept 2015] [plaintiff fell from scaffold that had no rails on sides and had no safety device to prevent him from falling]; *Garzon v Viola*, 124 AD3d 715 [2d Dept 2015] [scaffold lacked rails on sides and plaintiff fell when scaffold tipped]; *Guaman v 1963 Ryer Realty Corp.*, 127 AD3d 454 [1st Dept 2015] [plaintiff entitled to judgment where he fell six stories from scaffold after other workers loosened scaffold's ropes, causing it to shift to vertical position, and accident caused by lack of guardrail on side of scaffold]). Acceptance of plaintiffs' argument that the scaffold should have protected him from the risk of slipping on the edge of the opening when his other foot was on the scaffold requires that a scaffold protect a worker from injury resulting from using the scaffold, not just to reach beyond it, but to remove himself from it in a manner that required him to balance himself precariously between the scaffold and the opening.

Plaintiffs, however, specify no such mechanism or any authority to support that proposition, nor do they demonstrate how a scaffold with a guardrail on the side abutting the wall could have protected Scrocco from falling. (*See e.g., Springer v Clark Publ. Co.*, 171 AD2d 914 [3d Dept 1991] [plaintiff fell when he slipped off wet scaffold and fell to ground; no evidence scaffold defective, undisputed that scaffold properly constructed and functional; that rain and mortar created slippery condition did not establish that scaffold not constructed, placed and operated so as to give plaintiff proper protection]; *see also Beesimer*, 216 AD2d at 855 [whether safety rails necessary to provide protection is question of fact as plaintiff injured when he slipped on surface on scaffold and grabbed onto scaffold to keep from falling off it; question of fact remained as to whether absence of rails was proximate cause of injuries]).

Moreover, as it is undisputed that a safety harness would not have prevented Scrocco's fall from the edge a few feet to the floor below it, plaintiffs have not shown that the absence of a working harness was the proximate cause of Scrocco's accident or injuries.

Plaintiffs thus fails to meet their *prima facie* burden of showing that the statute was violated and that the alleged violation was the proximate cause of Scrocco's accident. Even if they made such a showing, it is undisputed that Scrocco made two decisions that contributed to his accident: stepping onto the edge of the opening even though he knew that it was covered with waterproof paper (*Miro v Plaza Constr. Corp.*, 38 AD3d 454 [1st Dept 2007], *as modified* 9 NY3d 948 [triable issues presented as to whether plaintiff was sole proximate cause of fall where plaintiff knew that ladder he chose to use was covered with sprayed-on fireproofing material and that he could have requested different ladder but chose not to]), and using a safety harness knowing it was missing essential parts and before waiting for his foreman to retrieve the parts for

him (*see Robinson v E. Med. Ctr., LP*, 6 NY3d 550 [2006] [plaintiff's actions were sole proximate cause of injuries where plaintiff knew he needed eight-foot ladder to perform task, and, among others, knew there were such ladders at worksite and where they were stored, and had asked foreman for ladder before starting task but nevertheless stood on top of six-foot ladder without talking to foreman again or looking for eight-foot ladder; plaintiff acted negligently in choosing to use too short ladder and then standing on its top to try to perform task]; *Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390 [4th Dept 2014] [plaintiff failed to establish that his decision to use ladder he knew was defective instead of another available ladder was not sole proximate cause of injuries]; *see also Miller v Webb of Buffalo, LLC*, 126 AD3d 1477 [4th Dept 2015], *lv denied* 26 NY3d 903 [as plaintiff used ladder to enter room through window and while completing task, coworkers removed ladder and told him ladder would be returned in few minutes, and plaintiff nevertheless decided to straddle window sill while waiting for ladder and fell from it, his actions were sole proximate cause of accident as he "decided to put safety at risk" by straddling sill]). Thus, even if plaintiffs met their *prima facie* burden, defendants thereby raise triable issues as to whether Scrocco was the sole proximate cause of his accident.

However, in Hopkins's opinion, Scrocco's maneuver was the only way he could accomplish his task. Thus, as in *Musselman*, an issue remains as to whether the placement of the scaffold left Scrocco with no option but to step off the scaffold in a way that exposed him to an elevation-related hazard resulting in his injury. (*See Bellreng v Sicoli & Massaro, Inc.* 108 AD3d 1027 [4th Dept 2013] [triable issues remained as to whether plaintiff had good reason to disconnect safety harness from lifeline because he could not reach new work area while connected or whether actions were sole proximate cause]; *Latchuk v Port Auth. of New York and*

*New Jersey*, 71 AD3d 560 [1st Dept 2010] [while plaintiff alleged that he had to get out of basket and remove safety harness to climb down to lower level, where he fell, factual issues remained as defendants contended that plaintiff's decision to climb down without using basket or harness was sole proximate cause of injuries]).

Given this result, neither party is entitled to judgment on plaintiffs' section 240(1) claim.

III. DEFENDANTS' MOTION TO DISMISS OTHER CLAIMS

A. Labor Law § 241(6) claim

1. Contentions

Defendants assert that plaintiffs' section 241(6) claims also fail for lack of evidence of causation, and that in any event, the Industrial Code violations cited are either inapplicable to the facts or fatally broad. They observe that plaintiffs do not allege that the guardrail's "construction, level or materials" caused his accident, and that New York law does not require that guardrails inhibit access to a work area. As harnesses too are not required for Scrocco's work, the Code provision relating to them is inapplicable. (NYSCEF 43).

In response, plaintiffs contend that because defendants failed to provide Scrocco with proper protection, Industrial Code 23-1.5 applies, that because there was no protective element covering the window opening, section 23-1.7 applies, that because the side of the scaffold abutting the building had no guardrail, section 23-1.15 applies, and that because defendants provided him with an inadequate safety harness, despite his complaints to the foreman, section 23-1.16 applies. (NYSCEF 73).

2. Analysis

As there are triable issues as to whether defendants violated section 240(1) by failing to

provide Scrocco with proper protection, and whether he was the sole proximate cause of his accident, dismissal of plaintiffs' claims based on a violation of Industrial Code section 23-1.7(b) (hazardous openings) is denied.

It has been held that Code section 23-1.5, which requires that employers provide safe working conditions, is too general to support a claim for a violation of section 241(6). (*Martinez v 342 Prop. LLC*, 128 AD3d 408 [1st Dept 2015]). Section 23-1.15, which provides the required dimensions for safety railings, is inapplicable given plaintiffs' allegation that the scaffold was missing a guardrail, not that it was improperly constructed. Section 23-1.16, governing safety harnesses, is inapplicable absent evidence that Scrocco's lack of a working harness contributed to his accident or injury. Plaintiffs do not address the other Industrial Code violations set forth in their bill of particulars or complaint.

B. Labor Law § 200/common-law negligence claim

1. Contentions

Plaintiffs contend that they have set forth a claim for a violation of section 200 of the Labor Law and/or common negligence as there exist triable issues as to whether defendants supervised and controlled Scrocco's work by "negligently performing safety inspections and by permitting a window and scaffold to remain unguarded," and that defendants should have had notice of the dangerous condition of the scaffold and window opening, observing that Marrone testified that he was on site to supervise daily activities as were other Plaza superintendents and that it also had a designated site safety person at the site. (NYSCEF 73).

Defendants argue that plaintiffs' claims implicate the means and methods of Scrocco's work, not whether a dangerous condition existed, and that the testimony they offer shows that

defendants did not supervise or control the work. (NYSCEF 43).

2. Analysis

As this case arises from the means and methods of Scrocco's work and not from a defect inherent in the property (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]), defendants cannot be held liable as the general performance of safety inspections, supervision of daily activities, and having a safety inspector on site do not constitute supervision and control. (*See Sovulj v Procida Realty and Constr. Corp. of New York*, 129 AD3d 414 [1st Dept 2015] [defendants did not supervise or control plaintiff's work; plaintiff made decision to remove safety guard from grinder]; *Suconota v Knickerbocker Props., LLC*, 116 AD3d 508 [1st Dept 2014] [defendant did not control work that caused plaintiff's accident as plaintiff testified to working solely under supervision of his employer-subcontractor's foreman and did not receive direction from anyone else]; *Fiorentino v Atlas Park LLC*, 95 AD3d 424 [1st Dept 2012] [owner's right to stop work if he observed subcontractor engaging in unsafe activity insufficient to constitute supervision and control]; *Foley v Consol. Edison Co. of New York*, 84 AD3d 476 [1st Dept 2011] [Con Edison's exercise of general supervisory powers over plaintiff or monitored timing and quality of work insufficient to impose liability for supervision and control]; *Martinez v 342 Prop. LLC*, 89 AD3d 468 [1st Dept 2011] [conducting weekly safety meetings and performing safety inspections not supervision and control]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED, that defendants' motion for summary judgment is granted only to the extent of dismissing: (1) plaintiffs' Labor Law § 241(6) claims except as to a violation of Industrial Code section 23-1.7(b), and (2) plaintiffs' Labor Law § 200/common negligence claim, and is otherwise denied.

ENTER:

Barbara Jaffe, JSC

DATED: October 28, 2016
New York, New York

BARBARA JAFFE
J.S.C.