SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 2

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FRANK ASPROMONTE,

Plaintiff,

-against-

JUDLAU CONTRACTING, INC., SKANSKA USA CIVIL INC., J.F. SHEA CONSTRUCTION INC., SCHIAVONE CONSTRUCTION CO. LLC, THE NEW YORK CITY TRANSIT AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, and THE CITY OF NEW YORK,

Defendants.

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DECISION & ORDER
Index No. 155793/2014
Mot. Seq. No. 002

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION, REFERRED TO ACCORDING TO THE DOCUMENT NUMBERS ASSIGNED TO THEM BY THE NEW YORK STATE COURTS ELECTRONIC FILING SYSTEM (NYSCEF):

PAPERS	NUMBERED
NOTICE OF MOTION, AFF. IN SUPP. AND EXHIBITS ANNEXED	28, 29, 31-47
MEMO. OF LAW IN SUPP.	30
AFF. IN OPP. AND EXHIBITS ANNEXED	52-57
REPLY AFF.	59

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

In this consolidated personal injury action, plaintiff moves for partial summary judgment in his favor on liability under Labor Law § 240 (1). Defendants oppose. After oral argument, and following a review of the papers submitted as well as the relevant statutes and case law, **the motion is denied.**

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff is a Local 3 union electrician who was employed by non-party electrical

subcontractor Hatzel & Buehler during construction on the 63rd Street subway station of the Second Avenue Line. Defendant Judlau Contracting, Inc. was the general contractor on the project. Plaintiff claims that, on October 25, 2013, he placed his hand on a temporary guardrail adjacent to an open shaft, and the guardrail broke, causing him to fall and sustain injuries consisting of, among other things, cervical spine herniation at C5-6, C6-7, C7-T1, cervical disc bulges at C4-5, cervical disc osteophytes at C3-4 through C6-7, left neural foraminal narrowing at C5-6 and C6-7, and lumbar spine herniations at L5-S1 and L4-5. Following joinder of issue, discovery, and the filing of the note of issue, plaintiff now moves for partial summary judgment in his favor on the issue of liability pursuant to Labor Law § 240 (1).[1]

POSITIONS OF THE PARTIES

Plaintiff asserts that the evidence adduced during discovery entitles him to summary judgment in his favor on the issue of liability.

Defendants make several arguments in opposition. First, they argue that plaintiff has failed to submit evidence as to whether any of the defendants, apart from Judlau, either owned the property or was a contractor on the project, and is therefore a proper Labor Law defendant.[2] Second, they claim that plaintiff's past criminal convictions and the fact that the fall was unwitnessed preclude

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[1] This Court notes that plaintiff's reply affirmation was mistakenly filed under motion sequence No. 001 (Doc. No. 59). As there is no indication that this error caused prejudice, it will be disregarded. *See* CPLR 2001.

[2] Although plaintiff has no response to this argument, it is unnecessary to reach it in light of this Court's conclusions regarding defendants' other arguments.

summary judgment.[3] Third, they contend that plaintiff's version of the events is incredible as a matter of law. Fourth, they claim that their experts raise issues of fact as to whether the accident happened at all. Fifth, they argue that there is an issue as to whether plaintiff was the sole proximate cause of the incident. Defendants offer no argument with respect to, and implicitly concede that, if it was within the scope of plaintiff's work to be where he was, and the incident happened the way that plaintiff described it, there would be liability against Judlau under Labor Law § 240 (1).

EVIDENCE SUBMITTED

In support of the motion, plaintiff submits, among other things, his own 50-h hearing transcript, and the transcripts of the depositions of Rodney Garutti and Jean Dorceus. At his 50-h hearing, plaintiff testified that, on the day of the incident, he and Garutti, his work partner, were on the G3 level of the subway station, which was closed to the general public, and were preparing to install brackets that provide support for conduit pipes. (Doc. No 39, at 165.) Plaintiff stated that they had previously been given the wrong measurements for the brackets, and they were in the process of removing the ones that they had already installed. (*Id.* at 168.) The work required one person to be on a scaffold and the other person to stand on the floor. (*Id.* at 173.) A high-pressured sodium light hanging from the ceiling served as a main source of illumination for the work site, along with streamers that plaintiff and Garutti had placed. (*Id.* at 176, 186.) According to plaintiff, Garutti moved the scaffold and knocked down the sodium light, which fell to the floor and broke. (*Id.* at 180.) Plaintiff stated that he picked up the big pieces of the broken fixture and Garutti swept

[3] These arguments are both without merit. It is well settled that "a criminal conviction by itself [cannot] raise an issue of fact as to credibility when the plaintiff is the sole witness to an accident." *Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 410 (1st Dept 2013).

up the debris. (*Id.* at 187.)

Plaintiff testified that, after picking up the fixture, he "went to place the fixture down [and,] as [he bent] down to place the fixture down and put [his] hand on [a] railing, [he] fell down the shaft." (*Id.* at 193.) He explained that the support rail "gave way" because it was "improper[ly] installed and [was] not the proper railing." (Doc. No. 40, at 252.) He further stated that the rail was merely a "two-by-four that was wedged between the wall [that] had no support and anchorage." (*Id.* at 251, 265.) Plaintiff testified that he touched the rail for "a split second" before it "gave way" and "caused [him] to fall down the shaft." (*Id.* at 287.) Plaintiff explained that a wall would later be built over the shaft but, at the time of the incident, it was "just a hole in the ground" with a wooden barricade around it. (*Id.* at 194-195.) He also testified that, at one point in the construction, there was a three-point guardrail system blocking the shaft but, at the time of his fall, that three-point system had been removed and replaced with a single wooden beam that was attached to the wall on one side and merely wedged in on the other side. (*Id.* at 195-201.)

According to plaintiff, he fell "[m]ore than twenty-five feet" and landed on his back on a set of "[f]our-by-fours." (*Id.* at 289-290.) He explained that he knew that it was at least 25 feet because Garutti used "a twenty-four-foot extension ladder down to get [plaintiff] out of there, and there was still not enough room for the ladder to reach the top of the slab of concrete that [he] was standing on." (*Id.* at 290.) He stated that one of the four-by-fours broke and fell to the lower floor and that, at the moment that he fell, he "clutched the four-by-fours so that [he] didn't fall to another level." (*Id.* at 300.)

Garutti, who is also a Local Union 3 electrician, testified that, at the time of the incident, he and plaintiff were pushing a rolling scaffolding, when the scaffolding hit a light and caused it to fall, leaving them in the dark. (Doc. No. 41, at 23-24.) He estimated that the light fixture weighed

approximately 15 to 20 pounds. (*Id.* at 25.) Garutti stated that he and plaintiff planned to replace the light fixture when the incident happened. (*Id.*) He explained that they "cleaned up and were removing [the fixture]. [Garutti] was going to throw it out and get a new one. [Garutti] was in the room [and] was [possibly] taking measurements for the next task at hand. Then [Garutti] heard a crash and [plaintiff] yelled [his] name." (*Id.* at 26.) Garutti testified that he "had to go down the hallway under the scaffolding and [he] left the room. When [he] came out to go find him, . . . [he] didn't even realize that he fell that way. [Garutti] just thought that [plaintiff] was going to be right there. [Garutti] actually left the room and then [he] heard [his] name and that's when [he] came back. And at that point, [Garutti] saw where [plaintiff] was. He was . . . 10, 12 feet below [him]." Garutti elaborated that when he went to the location where plaintiff fell, he noticed that there was a "two by four broken" and "hanging from the wall, from the right side just dangling." (*Id.* at 46.)

He stated that, at that point, he went to get help and found another employee, who went with him to help get plaintiff out of the hole by putting down a ladder. Garutti explained that he was surprised to see that plaintiff had fallen in the direction that he fell. (*Id.* at 40.) He testified that he found plaintiff "on his back," but that plaintiff was able to stand up and make his way up the ladder after they sent the ladder down. (*Id.* at 45.) When asked whether Garutti saw any injuries, bleeding, or damaged clothing on plaintiff, he answered in the negative. (*Id.* at 72-73.)

Dorceus, a safety manager for Judlau, testified that, shortly after the incident, he was called and met plaintiff as he got off of an elevator. (Doc. No. 42, at 40.) He stated that plaintiff told him that he had fallen "15 feet or something." (*Id.*) Dorceus testified that he said, "we have to go to the hospital and make an accident report," to which plaintiff responded, "'no, no, I'm okay' [and then] raised his hands in the air, fidgeting, [and] showing that he's okay, he can move, nothing was wrong with him." (*Id.*) Dorceus stated that he then "told his foreman [that he was] going to [his] office

[and] getting an accident report." (*Id.*) He testified that plaintiff refused to fill out the accident report, which included a post-accident drug test, with the likely reason being that he knew he would fail. (*Id.* at 42-43.)[4]

In opposition to the motion, defendants submit the affirmation of neuroradiologist Craig H. Sherman, M.D. (Doc. No. 54.) Sherman opines that, based on his review of the imaging studies performed on or after the date of plaintiff's incident, all of the findings therein are "pre-existing and unrelated to the alleged incident. Findings in the cervical, thoracic and lumbar spine are all chronic and degenerative in nature. No chest, bilateral rib, right shoulder or right leg injury is present. The radiographic and MRI films do not show any acute traumatic injury. The lack of any acute traumatic injuries would be indicative of [plaintiff] not falling from a height as claimed." (Doc. No. 54.)

Defendants also submit the affirmation of Leon Kazarian, a biomechanical engineer. Kazarian took into account plaintiff's size in comparison to the distances that he may have fallen, from 10 to 25 feet, and the impact that falls within that range would have had on his body. According to Kazarian's analysis, plaintiff's injuries are inconsistent with falls of 12 to 25 feet. In Kazarian's opinion, had plaintiff fallen even as few as 12 feet, he would have sustained injuries far more severe than those alleged. Namely, plaintiff would have incurred, at a minimum, a fracture. (Doc. No. 56.)

CONCLUSIONS OF LAW

Labor Law § 240 (1) requires contractors and owners engaged "in the erection, demolition,

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[4] Plaintiff testified that he takes between six and eight 30 milligram oxycodone pills per day for pain, and that he has been taking oxycodone since 2011, when he injured his finger. (Doc. No. 39, at 93-98.)

repairing, altering, painting, cleaning or pointing of a building or structure" to provide "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." "Although the statute is meant to be liberally construed to accomplish its intended purpose, absolute liability [is imposed only] where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential." *O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, ___ 2017 NY Slip Op 02466, *2 (2017) (internal quotation marks and citations omitted). "In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason, [the Court of Appeals has] continued to aid plaintiffs with a presumption that the ladder or scaffolding device was not good enough to afford proper protection." *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 (2003) (citations omitted); *see Kebe v Greenpoint-Goldman Corp.*, ___ AD3d ___, 2017 NY Slip Op 03712 (1st Dept 2017); *see also Quatrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 (1st Dept 2007), *affd* 11 NY3d 757 (2008).

The courts of this state have accepted biomechanical engineering as competent science to aid in evaluating the injuries sustained by a plaintiff in comparison with the severity of an incident. *See Vargas v Sabri*, 115 Ad3d 505, 505 (1st Dept 2014); *Holmes v Brini Tr. Inc.*, 123 AD3d 628, *Valentine v Grossman*, 283 AD2d 571, 572-573 (2d Dept 2011); *Cocca v Conway*, 283 AD2d 787 (3d Dept 2001), *lv denied* 96 NY2d 721 (2001). Expert opinions may serve to create an issue of fact as to the credibility of a plaintiff where such opinion is "nonconclusory" (*Manswell v Montefiore Med. Ctr.*, 144 AD3d 564, 565 [1st Dept 2016]; *see e.g. Johnson v Ann-Gur Realty Corp.*, 117 AD3d 522 [1st Dept 2014]), but not where the opinion is "speculative and unsupported by the evidence" (*Strojek v 33 E. 70th St. Corp.*, 128 AD3d 490, 491 [1st Dept 2015]; *see Salzer v Benderson Dev.*

Co., LLC, 130 AD3d 1226, 1229 n 2 [3d Dept 2015]; *Gray v South Colonie Cent. School Dist.*, 64 AD3d 1125, 1128 [3d Dept 2009]).

Finally, on a motion for summary judgment, the movant "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 Hosp.*, 68 NY2d 320, 324 (1986). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Id.*

Here, plaintiff's testimony, as corroborated by Garutti, suffices to meet his prima facie burden, at least with respect to Judlau. If, as plaintiff testified, he was clearing a broken light fixture and placed his hand against a guardrail that gave way for no apparent reason, causing him to fall into an open shaft, liability pursuant to Labor Law § 240 (1) is established. *See Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 289 n 8 (2003); *Kebe v Greenpoint-Goldman Corp.*, 2017 NY Slip Op 03712; *Quatrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d at 381. Although plaintiff's claim that he fell 25 feet onto his back, causing a four-by-four to break, and then climbed up a ladder, spoke to his colleagues and walked around without any difficulty, requires some suspension of disbelief, it is not incredible as a matter of law.

However, defendants' experts demonstrated the existence of a triable issue of fact as to whether the plaintiff's account of the accident is credible. Sherman observed that plaintiff's films did not demonstrate any evidence of acute trauma indicative of a fall from a height, rather that the films showed only evidence of a degenerative condition. Similarly, Kazarian opined that, assuming the various distances that plaintiff and the other witnesses testified that plaintiff may have fallen, the injuries would have been worse than those that he sustained. Plaintiff has offered nothing in reply

to cast doubt on the opinions of defendants' experts, dismissing them as "specious" and "cynical," but not calling into question the methodologies they used. Their conclusions are not mere speculation but based on plaintiff's radiological studies conducted before and after the incident, which show that he did not experience the acute trauma that a fall from a height very likely would have caused.

In this regard, it is notable that Garutti did not witness the fall as it was happening; he merely heard a crash and then observed plaintiff at the bottom of the shaft. Although he corroborated that the guardrail was broken and that plaintiff was at the bottom of the shaft, he could not corroborate the precise manner in which plaintiff claims he fell. Considering that plaintiff is the only person who has personal knowledge of the moment of his fall and that defendants' experts opined that the injuries he sustained were not consistent with a fall from a height, there is a triable issue of fact as to whether plaintiff fell in the manner he claims, precluding summary judgment in his favor. *Cf. Kone v Rodriguez*, 107 AD3d 537, 538 (1st Dept 2013); *Malupa v Oppong*, 106 AD3d 538, 539 (1st Dept 2013).

Accordingly, it is hereby:

ORDERED that plaintiff's motion for summary judgment in his favor is denied.

This constitutes the decision and order of the court.

DATED: May 16, 2017

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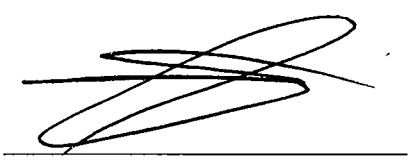

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