SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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CARLOS SAQUICARAY,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

- v -

CLEAN UP SERVICES, INC.,

Third-Party Defendant.

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INDEX NO. 161299/2013

MOTION DATE

MOTION SEQ. NO. 001 and 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 49-70, 72, 85-92, 94-105, 121-124, 129-133; 35-48, 71,73-84, 93, 106-120, 125-128, 134-135

were read on this application to/for Summary Judgment

Plaintiff moves for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendant Consolidated Edison Company of New York, Inc. ("Con Edison")(mot. seq. 001). Con Edison and third-party defendant Clean Up Services, Inc. ("Clean Up") oppose the motion. Clean Up also moves for summary judgment dismissing the third-party complaint against it (mot. seq. 002). The motions are consolidated for disposition.

BACKGROUND

This action stems from a January 13, 2013 accident at Con Edison's West 28th Street Yard, located at 636 West 29th Street in Manhattan ("West 28th Street Yard"). On that date, plaintiff, employed by third-party defendant, Clean Up, was struck in the leg by a metal plate weighing approximately two tons thus sustaining a leg injury. Con Edison owned the premises where the accident occurred.

Plaintiff's Deposition Testimony

The plaintiff, Carlos Saquicaray, had been employed as a truck driver by Clean Up, which performs different kinds of deliveries for Con Edison, for almost five years prior to the accident. Plaintiff received on-the-job training from more experienced Clean Up drivers. The Clean Up owner, "John," was his direct supervisor.

On the date of the accident, plaintiff started work at 6:00 a.m. A fellow Clean Up employee, Louis, served as his helper and they were given the task of transporting and returning a metal plate from Clean Up's yard (which was located between Brooklyn and Queens)[1] to Con Edison's West 28th Street Yard, located on the west side of Manhattan at 28th Street and 11th Avenue, by truck. Plaintiff and Louis had performed this type of delivery operation many times before the date of the accident. The 12-wheel Clean Up truck plaintiff was given to use that morning was already preloaded with a metal plate. Plaintiff and Louis drove the truck to the West 28th Street Yard and parked. The accident occurred between 11:45 am and 12:00 pm.

Plaintiff was wearing a hard hat, gloves, and steel toe boots that day, all of which was provided by Clean Up. In preparation for unloading the metal plate, plaintiff went onto the back

[1] Plaintiff also testified that he picked up the plate from a Con Edison jobsite in Manhattan and then took it to the West 28th Street Yard (plaintiff tr. 60).

of the truck where the metal plate was located. He attached a chain and two clamps to the two sides in the center of the plate. The plate did not have any holes in it. Plaintiff did not use a measuring device but determined where to place the clamps with his eyes based on his years of experience. After he attached the clamps to the plate, he remained on the back of the truck. It was his custom and practice with Louis that once a plate was lifted, plaintiff would steady it by hand. No other chains or clamps were available for him to use while unloading the plate. He had attached a plate to a chain in order to unload it an estimated 100 times.

Louis stood in the roadway where the cab of the truck ended and the truck bed began to operate the boom controls. After the clamps were attached, plaintiff gave him a hand signal to begin lifting the plate. Louis then operated the controls to hoist the plate in the air. Plaintiff was approximately two feet away from the plate when it started to be lifted. As the plate was being hoisted into the air, it first went straight up and then moved, striking the Plaintiff in the left leg, knocking him over and causing him to briefly lose consciousness. Plaintiff fell on top of the plate.

An ambulance arrived to take plaintiff to St. Luke's Roosevelt Hospital in Manhattan where he received x-rays and was released the same day. The Plaintiff alleges extensive injuries to his ankle, knee, and lower back as a result of the accident and he has undergone numerous procedures to treat those injuries.

Deposition of John Eisenhut (Con Edison Mechanic A)

John Eisenhut was an employee of Con Edison on the date of the accident, employed as a Mechanic A[2]. His job at Con Edison includes rebuilding transformer vaults, manholes, and

[2] "Mechanic A" is a title that signifies a journeyman mechanic.

services boxes. He recalled that Clean Up went around to job sites and removed excavation debris and offloaded steel plates from trucks and put them over excavated trenches.

On the date of the accident, Mr. Eisenhut saw plaintiff's Clean Up truck pull into the lot. The truck crew began to unload the truck as it was parked near the gassing area. One crew member was operating the boom and the other crew member (plaintiff) got in the bed of the truck and connected the steel clamps to the plate. The clamps were clamped in the middle of the plate and plaintiff was in the back of the truck. The steel plate was not lifted perfectly as it tilted about a foot lower to the back of the truck. When it was hoisted, the plate slid towards the back of the truck and struck the plaintiff in the shin and the plaintiff fell forward and was laid on top of the plate. Mr. Eisenhut called 911 and helped carry plaintiff off the truck.

Deposition of Naveen Kumar (Con Edison Operating Supervisor)

On the date of the accident, Naveen Kumar was employed by Con Edison as an operating supervisor of subsurface construction working out of an office at the West 28th Street Yard.

Clean Up worked at excavation sites for electrical work and their work included offloading and picking up plates and taking away debris in bags. The jobsites where Clean Up went to either offload or pick up plates or remove bagged debris were excavation sites for electrical work. Mr. Kumar would call Clean Up on Con Edison's behalf to move plates.

He observed Clean Up either loading or offloading steel plates using a boom truck in the West 28th Street Yard more than 50 times and they always attached chains to the end of the hook and used side clamps. He had observed them using straps or slings to load or offload steel plates but could not say how many times. Clean Up used its own boom truck and clamps to offload or load steel plates. He did not believe that Con Edison had tag lines at the West 28th Street Yard. No structure was being built or constructed or altered, repaired, or painted in the area where the

Clean Up crew was offloading the plate on the accident date. Mr. Kumar did not give plaintiff or his coworker any direction as to means or methods to perform their jobs.

Mr. Kumar did not know the size or weight of the subject plate but stated that it appeared thicker than one inch. When asked if there were any holes in the plate, he stated, "It should be, every plate has two holes." He recalled that every plate has two holes on the side of the plate in the middle, and some had four holes. He stated that "[s]ometimes people have the option of picking up slings (straps) or with the blocking chains." Con Edison uses both. Usually the boom is used to load and offload steel plates and he had never seen a forklift picking up a plate in his yard. No one ever told him that it was improper to use chains to attach to steel plates and to hoist them.

After the accident, Mr. Eisenhut called him and told him that an employee was injured. Mr. Kumar left his office and saw a "guy" laying down and said to call an ambulance and that he would notify his control board.

Deposition of Jon McGillick (Clean Up Services, Inc. Owner)

Jon McGillick described his company, Clean Up, as a small contractor for Con Edison with approximately 30 employees. Clean Up removes debris from excavation sites, picks up and delivers steel plates, rents out equipment, erects barricades, and unloads concrete and metal slabs. The company performs work for Con Edison pursuant to written purchase order contract. While McGillick could not locate the signed purchase order that was in effect on the date of the accident, he testified that the purchase order contracts that the company had with Con Edison were basically for the same type of service and the Standard Terms and Conditions of Service Contracts dated December 15, 2010 was "probably" part of the contract that Clean Up had with Con Edison on the date of the accident. Clean Up learns what locations to go to and tasks to

perform on a particular day through calls or faxes and Clean Up employees dealt directly with Con Edison to get their assignments.

Mr. Saquicaray was a driver of boom trucks. On the date of the accident, plaintiff's partner was Freddie Lopez who was called "Luis." Both Mr. Saquicaray and Mr. Lopez had operated the boom an estimated over 100 times. They were given on-the-job training by other employees for this work. Mr. McGillick recalled that several months before the accident, plaintiff repeatedly asked to be fired so he could collect unemployment since the company did not have full-time work for him. Mr. McGillick refused, telling plaintiff that he needed him part-time.

Clean-Up owned the boom truck, clamps, and two chains attached to the boom. The controls for the boom are operated by a remote control that goes around the neck. Consistent with his on-the-job training, when offloading a truck, the person who puts the plate clamps on is supposed to then step out of the back of the truck. Most of the plates are lifted using clamps and a boom with a chain attached. Luis was instructed during his on-the-job training to center the clamps and pick up the plate straight. Mr. McGillick estimated that a 6' or 7' by 12' plate weighs about 4,000 or 5,000 pounds. Chains are used instead of slings because chains are stronger than slings and do not wear like slings.

Purchase Order Between Con Edison and Clean Up

Clean Up performed this work for Con Edison under purchase order number 135802 and the Standard Terms And Conditions of Service Contracts which was in effect on the date of the accident, January 13, 2013.[3] Pursuant to the purchase order, Clean Up was to, among other

[3] In Con Edison's verified reply to plaintiff's notice to admit, Con Edison admits that the purchase order number 135802 and the Standard Terms and Conditions of Service Contracts were in effect on January 13, 2013.

things, furnish supervision, labor, equipment, and facilities for the loading, removal, transport, and disposal of excavated debris from Con Edison transfer stations located in Westchester County and at various street excavation sites in Manhattan, Bronx, Brooklyn, and Queens (October 13, 2011 purchase order, p. 1). Clean Up was to also pick up and deliver 4' x 8' and 6' x 12' steel plates to various locations (*id.* at p. 5, 7).

DISCUSSION

"[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 eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep't 2010), *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the moving party meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012), *citing Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

Plaintiff's Labor Law § 240 (1) Claim

Plaintiff moves for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim, arguing that he was struck by a heavy improperly-hoisted and inadequately-

secured load in violation of applicable industry standards while working at a Con Edison-owned premises.

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v. Morse Diesel*, 98 A.D.2d 615, 615 [1st Dep't 1983]), 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.

That section "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 A.D.2d 114, 118 (1st Dep't 2001) (quoting *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 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 N.Y.2d 259, 267 (2001); *Kebe v. Greenpoint-Goldman Corp.*, 150 A.D.3d 453, 453 (1st Dep't 2017); *Hill v. City of New York*, 140 A.D.3d 568, 570 (1st Dep't 2016).

A threshold issue is whether plaintiff's work falls within the purview of Labor Law § 240 (1). Con Edison and Clean Up argue that plaintiff was not engaged in an activity that was protected by the Labor Law and that for strict liability to apply, he must have been working on a "structure," and that because he was in the process of unloading a truck in a yard where no

structures were being constructed, repaired, altered or painted, Labor Law § 240 (1) does not apply.

For purposes of the statute, a structure is "a production or piece of work artificially built up or composed of parts joined together in some definite manner." *See Dos Santos v. Consolidated Edison of N.Y., Inc.*, 104 A.D.3d 606, 608 (1st Dep't 2013)(internal citation omitted)(finding that a manhole met the definition of a structure as per the statute). *See also Sinzieri v. Expositions, Inc.*, 270 A.D.2d 332, 333 (2d Dep't)(the exhibit, "which was composed of interlocking parts," fell within the definition of "'structure' under Labor Law § 240(1)"]).

In addition,

> Whether an item is or is not a "structure" is fact-specific and must be determined on a case-by-case basis. In determining each case, courts may consider a number of relevant factors. These factors should include, but are not necessarily limited to, the item's size, purpose, design, composition, and degree of complexity; the ease or difficulty of its assembly and disassembly; the tools required to create it and dismantle it; the manner and degree of its interconnecting parts; and the amount of time the item is to exist. However, no one factor should be deemed controlling.

McCoy v. Kirsch, 99 A.D.3d 13, 16-17 (2d Dep't 2012).

Plaintiff's work at the yard delivering and offloading steel plates was undertaken pursuant to a purchase order contract related to excavation work performed at Con Edison's street excavation sites as part of subsurface construction efforts, invoking the statute. Moreover, at the time of the accident, Con Edison mechanic Mr. Eisenhut testified that he was building slabs (removable roofs for transformer vaults) at the West 28th Street Yard, which would certainly qualify as a structure.

"[F]or plaintiff to recover under section 240(1), the threshold issue to be resolved is whether there was a violation of the statute. If a violation exists, the court must determine whether that violation was the proximate cause of plaintiff's injuries." *Quattrocchi v. F.J.*

Sciame Const. Corp., 44 A.D.3d 377, 381 (1st Dep't 2007). *See also Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 287 (2003); *Felker v. Corning Inc.*, 90 N.Y.2d 219, 224-225.(1997); *Torres v. Monroe Coll.*, 12 A.D.3d 261, 262 (1st Dep't 2004).

To recover damages for a violation of Labor Law § 240 (1) under a falling objects theory as is asserted here, a plaintiff must demonstrate that the object that fell was in the process of being hoisted or secured, or that it "was 'a load that required securing for the purposes of the undertaking at the time it fell [citation omitted]'" *Cammon v. City of New York*, 21 A.D.3d 196, 200 (1st Dep't 2005); *Dedndreaj v ABC Carpet & Home*, 93 A.D.3d 487, 488 (1st Dep't 2012)("Plaintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"). Plaintiff has met that burden here as the steel plate was being hoisted and was a load that required securing for purposes of the undertaking. *See Grant v Solomon R. Guggenheim Museum*, 139 A.D.3d 583, 584 (1st Dep't 2016)("preparing a six-foot tall crate [of glass] weighing at least 1,500 pounds for hoisting posed an elevation-related risk for plaintiff within the meaning of Labor Law § 240 (1), and the crate was an object that required securing for the purposes of the undertaking")(internal citation omitted).

Further, as plaintiff argues, Labor Law § 240 (1) applies here because the subject work posed an elevation-related hazard that called for the provision of a securing device for the plate, such as a tag line or strap, and none was provided. *Williams v. Town of Pittstown*, 100 A.D.3d 1250, 1251 (3d Dep't 2012); *Skow v. Jones, Lang and Wooton Corp.*, 240 A.D.2d 194, 195 (1st Dep't 1997). The plate being hoisted was an object in need of securing for the purposes of the

undertaking and additional safety devices were needed to keep the plate from swinging into plaintiff.

That the steel plate fell the distance of only a few feet is of no consequence. Because the plate weighed approximately 4,000 or 5,000 pounds, the distance it fell cannot be considered de minimis for the purposes of the statute. As articulated by the Court of Appeals in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 N.Y.3d 1, 10 (2011), applying *Runner v New York Stock Exch., Inc.*, 13 N.Y.3d 599 (2009), a height differential cannot be considered de minimis if the heavy weight of the falling object makes it capable of generating an extreme amount of force, even though it made only a short descent. *See also Marrero v 2075 Holding Co. LLC*, 106 A.D.3d 408, 409 (1st Dep't 2013)("[g]iven the beams' total weight of 1,000 pounds and the force they were able to generate during their descent, the height differential was not de minimis"), *Landi v. SDS William Street, LLC*, 146 A.D.3d 33, 37 (1st Dep't 2016) (height differential on ramp not de minimis where plaintiff pushed a pallet carrying a 3,000 pound load).

The evidence is clear that a violation of Labor Law § 240 (1) occurred and plaintiff was not the sole proximate cause of his injuries which were caused in part by the lack of safety devices here. *See Bonaerge v. Leighton House Condominium*, 134 A.D.3d 648, 649 (1st Dep't 2015). Accordingly, plaintiff is entitled to partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim.

Clean Up's Motion for Partial Summary Judgment

Third-party defendant Clean Up moves for summary judgment dismissing the complaint and third-party complaint alleging indemnification and breach of contract predicated on Plaintiff's verified complaint alleging violations of Labor Law § 200, 240 (1) and 241 (6), Industrial Code provisions, and common law negligence. Clean Up argues for dismissal of the

complaint in that liability "cannot pass up" and does not specifically address the third-party claims. In light of the court's granting of the plaintiff's motion for partial summary judgment on liability, Clean Up's arguments addressing plaintiff's Labor Law § 200, 241 (6), Industrial Code, and common law negligence claims are academic [*Fanning v. Rockefeller Univ.*, 106 AD3d 484, 485 (1st Dep't 2013)] and the motion is denied.

The court has considered the remainder of Con Edison's and Clean Up's arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that plaintiff Carlos Saquicaray's motion, pursuant to CPLR 3212, for partial summary judgment in his favor as to liability on his Labor Law § 240 (1) claim against defendant Consolidated Edison Company of New York, Inc. is granted; and it is further

ORDERED, that the motion by third-party defendant, Clean Up Services, Inc., for summary judgment is denied.

This constitutes the decision and order of the court.

10/25/17
DATE

KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[X]	NON-FINAL DISPOSITION			
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER	[ ]	SUBMIT ORDER			
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