

Da Silva v Champ Constr. Corp.
2018 NY Slip Op 30003(U)
January 3, 2018
Supreme Court, Kings County
Docket Number: 506852/13
Judge: Debra Silber
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of January, 2018.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

-----X

DEVAIR DA SILVA,

Plaintiff,

- against -

CHAMP CONSTRUCTION CORP.,
57 GRAHAM CORP., LES LEV CORP.
And CP & ASSOCIATES CONSTRUCTION CORP.,

Defendants.

-----X

DECISION/ORDER

Index No. 506852/13
Mot. Seq. # 7
Submitted: 10/26/17

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for partial summary judgment

Papers	Numbered
Notice of Motion, Affirmations, and Exhibits Annexed.....	<u>1-14</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>15-16, 17-19</u>
Reply Affirmation and Exhibits Annexed.....	<u>20</u>
Other: _____	_____

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Plaintiff herein moves for an order, pursuant to CPLR 3212, granting him summary judgment on his cause of action under Labor Law §240 (1). The defendants oppose the motion. The third-party defendants also opposed the motion, but, as the third-party action was dismissed after this motion was made but before it was argued, their papers were not considered. For the reasons which follow, the motion is denied.

Background

This action arises out of an August 14, 2013 construction accident in which plaintiff Devair Da Silva (Da Silva), a construction worker employed by Champ Construction Corp. (hereinafter Champ), was injured during the course of his employment at a job located at 57 Graham Avenue in Brooklyn. Specifically, Da Silva injured his hand when it was struck by the blade of a cement "helicopter."¹ 57 Graham Corp. (hereinafter 57 Graham) owned the real property and the building under construction, CP & Associates Construction Corp., (hereinafter CPA) was the general contractor for the construction project and Champ was a subcontractor hired by CPA. The third-party action was brought by defendant Champ, as third-party plaintiff, against its insurance broker and the broker's principal with regard to Workers' Compensation insurance. It was dismissed by a prior order of the court, dated September 11, 2017, following a motion and a cross motion for summary judgment with regard to Champ's claim that the third-party defendants were obligated to provide them with Workers' Compensation insurance coverage. Plaintiff discontinued the action as against defendant Les Lev Corp. in 2014, pursuant to a stipulation of discontinuance. The note of issue was filed on March 16, 2017, and the case is on the calendar for trial on January 8, 2018.

Plaintiff's Motion for Summary Judgment

Plaintiff supports his motion with an affirmation of counsel, the pleadings, the plaintiff's bill of particulars, the EBT transcripts of plaintiff, Nicola ("Nick") Ciampone and Roopnarine Saugh on behalf of Champ, a photograph of the piece of equipment which injured the plaintiff and an affidavit from Daniel S. Burdett, P.E., plaintiff's expert. While the EBT transcripts in the copy provided to the court are four pages to a page, blurry

¹ It is more routinely called a cement troweling machine, but plaintiff and his co-workers called it a helicopter.

and too light to read, the e-filed versions are full and clear pages. If this were not the case, the motion would have been denied with leave to renew with readable transcripts.

Plaintiff testified at his EBT that Champ was hired to do cement work at the building, which was new construction. He testified with the assistance of a Portuguese interpreter. He was born in Brazil and came to the U.S. in 2004, when he was about 29 years old. In Brazil, he had only gone to school until third grade. He started working for Champ in 2012. The day of the accident was his first day at this job site. He had used the cement helicopter many times before. The helicopter is a piece of equipment which smooths cement after it is poured.² He was asked to serve as a cement finisher at this job site, he testified.

Plaintiff testified that on the day of his accident, he arrived at the job site in a Champ truck full of equipment for the job. There were about six Champ employees, and the first thing they did was to unload the truck. They were going to pour and finish a cement floor at the ground level of the building that day. There were other Champ workers who were building the walls with cement blocks [Page 100]. They needed to bring the equipment to the second floor of the building. Ultimately, the building became five stories high, but on this day, it was only two stories high and there weren't any staircases installed. He asked the foreman, known as Smith, how they should get the helicopter to the second floor. Mr. Smith told them that three workers should be on the second floor and three on the ground, and they should lift it with a rope [Page 20]. Mr. Smith tied the rope around the handle of the helicopter himself [Page 105]. Plaintiff went up to the second floor with Jose and Joao. They climbed up to the second floor on a ladder [Page 99]. There were no scaffolds on the outside of the building. The three workers on the sidewalk, including Smith, guided it until it was out of their reach. The

² The court notes that the photograph in plaintiff's papers indicates that it looks like an old-fashioned round metal floor fan, but the end of the pole is a handle instead of a stand.

second floor was about sixteen feet from the ground [Page 108]. When the helicopter was hoisted to the second floor, it could not be pulled inside because there were iron bars in the way [Page 21]. It was hanging on the outside of the building. He reached to grab it and lift it inside, it seems he is saying. He first hammered the bars out of the way so there would be room to bring it in. It was outside the building, at the level of his feet. They were able to rest it on a concrete block that extended out from the facade while he hammered the bars apart. He then kneeled down and grabbed the guard on the helicopter, while the two workers with him were holding the handle. He tried to lift it into the building, but not only was it very heavy, but it was not balanced on the cement block, so it tilted/rolled and the blades severely cut three of his fingers [Page 30]. He also injured his back. By then, the helicopter was halfway into the second floor, so he “let go” and the other workers pulled it in [Page 116]. The remainder of his testimony is about his injuries and his medical treatment and his work history prior to the accident.

Plaintiff's expert, Daniel S. Burdett, P.E., provides an affidavit dated May 15, 2017. Therein, he describes the documents he reviewed, describes the plaintiff's accident, with what he states is properly called a cement finishing/troweling machine, commonly known as a helicopter, and concludes that, with a reasonable degree of engineering certainty, [¶8] that the “rope provided to Plaintiff and his co-workers for the manual hoisting of the heavy helicopter machine (regardless whether it weighed 120 pounds, 160 pounds or 350 pounds) from grade to the second floor level of the building was improper, inadequate and not in accordance with safe construction industry practice for the task at hand.” Mr. Burdett states that “not only was the machine too heavy to be safely hoisted in the described manner using only a rope, but it also was entirely foreseeable that the suspended but otherwise unsecured machine would move and roll as attempts were made to move it into the building, and that a worker being required to utilize such a manual hoisting method could sustain physical injuries of the type plaintiff suffered here” [¶10]. He opines that plaintiff should have been provided

with either a mechanical or hydraulic hoist or a crane with tag lines to raise the equipment up to the second floor.

Mr. Saugh was deposed on January 5, 2017. This is more than a year after plaintiff's EBT. At the time of his deposition, he was still employed by Champ. However, he took a different job a few months after plaintiff's accident and did not return to Champ for about three years [Page 141]. The crew called him "Smith." He was born in Trinidad and came to the U.S. in 2001. He has been working in construction since he came to the U.S., and for Champ since 2010. He was hired as a foreman at Champ by the owner, Nick Ciampone. At the time of the accident he had not yet obtained his Concrete Safety Manager's Certification. Asked if he had ever heard of the New York Industrial Code, he said "no." [Page 22]. He was a foreman at the 57 Graham job site, but he was not there all the time. The company had him rotate with another foreman named "Chris." He testified that Chris stopped working for Champ several years ago and he did not know his last name. Asked if he knew the name of the general contractor at the job, he said he did not know who it was.

Mr. Saugh testified that he has used a cement helicopter every day for thirteen years, [Page 28] and was very familiar with it. He said he was aware that it was called a cement troweling machine, but he called it a helicopter. He testified that they come in different sizes, from around three feet to six feet in diameter as regards the circular part that looks like a fan with blades [Page 30]. For the 30 inch diameter helicopter, which is what he thinks plaintiff was using on the day of his accident, the handle is about forty-two inches long and it weighs about 120 pounds [Page 33]. Shown the photo of the helicopter, Mr. Saugh could not say what size it was from the photo [Page 84].

For this job, he was asked to go to the job site when they needed cement³ to be poured and finished, as he did the finishing work for the floors. He was asked the

³ The EBTs refer to the flooring material interchangeably as cement and as concrete.

names of the workers in the crew at the time of plaintiff's accident, almost four years earlier, and he had difficulty identifying some of them by name [Page 35 - 40]. He testified that most of the workers had nicknames, and his was "Smith." He had a morning meeting at 7:00 a.m. to tell the workers what they would be doing for the day. He requires his workers to wear hard hats, safety goggles and gloves at all times [Page 45]. He had been working with the plaintiff for about a year and a half to two years before the accident [Page 48].⁴

Mr. Saugh was then asked about the day of the plaintiff's accident. He testified that plaintiff had arrived around forty-five minutes late and had missed the morning meeting [Page 57]. When plaintiff arrived, he and a worker named Marcos were standing on a scaffold at the second floor level and were pulling the helicopter up to the second floor. Jose and Hamilton were on the sidewalk helping them raise the helicopter. There was going to be a concrete pour at 9:00 a.m. on the first floor [Page 60]. They had to move all the tools to the second floor to clear the first floor before the pour. There was a manual pulley on the scaffold which was at the front of the building [page 63]. The pulley had been put in place the day before. It was attached to the scaffold at one level above the second floor [Page 66]. They had not built the third floor yet. Plaintiff walked through the gate and over to Jose and Hamilton. He saw this from the scaffold he was standing on [Page 72]. Plaintiff had work boots on. He could not remember if plaintiff was wearing goggles or gloves. Jose and Hamilton had put the helicopter on the rope, not him [Page 77]. He observed plaintiff try to help the other workers "lift" the helicopter [Page 76]. At that point, the machine was about three feet off the ground [Page 79]. Seconds later, he heard one of the workers yell that plaintiff had cut his hand. He did not see the accident, as he and Marcos were holding onto the rope and looking up at the pulley. He and Marcos lowered the machine and went

⁴ Plaintiff testified that he had been working for Champ for ten months prior to the accident.

downstairs [Page 99]. He saw blood. Plaintiff said he was trying to help them lift the machine and got cut by the blades [Page 106]. Hamilton agreed that the accident took place that way. [Page 108]. He asked plaintiff if he should call an ambulance and plaintiff said “no.” He called Nick, the boss, on his cell phone. Nick told him to take plaintiff to the nearest hospital, and he did. He dropped plaintiff off, asked the receptionist to take a blood test to find out if plaintiff was intoxicated, as he smelled alcohol on his breath, and then he went back to the job site. He had not discussed with plaintiff that he smelled of alcohol. He did not ask the other workers if they smelled it. He did not fill out any accident report. He is supposed to fill out one as the foreman [Page 123]. He is also supposed to take photos of the injury and the job site. He did not do so. When he got back to the site, Nick had sent another worker to take plaintiff’s place and they continued to work. Plaintiff called him when he was released from the emergency room and told him he was going to go home. He has never spoken to plaintiff again.

Mr. Ciampone was deposed in April of 2016. When asked who the foreman was for this job site, he said Chris was the foreman for phase one, which was the creation of the foundation, and he could not remember his last name, and Smith was the foreman for phase two, and he couldn’t remember his real name [Page 31]. He testified that the general contractor directed him to stop work after the day of plaintiff’s accident and Champ did not finish the job [Page 34].

Mr. Ciampone was asked how the helicopter was brought up to each floor at a worksite and he testified that if there were no interior stairs to carry it up, they would use an elevator hoist [Page 57]. He said he asked the CPA superintendent for a hoist or stairs and he was instead provided with a scaffold at the rear of the building [Page 63]. He was not promised a hoist – he was told they would do “their best.” He testified that the scaffold was there when they arrived to do the floors. He admitted that the scaffold and pulley were not suitable to raise the helicopter without a hoist [Page 63]. He said

that he had a morning appointment and he only went to the site when he received the call from Smith that plaintiff had been injured. His foreman did not call him in the morning to tell him that there was no hoist [Page 65]. Mr. Ciampone proceeded to explain how he understood the accident happened. He said he was told by Smith (Saugh) that plaintiff and Smith were on the ground level. Plaintiff was supposed to be bringing the tools and equipment up to the second floor. He had decided to help with the helicopter, but that was not what he was assigned to do. The helicopter was six feet off the ground when plaintiff came over to Smith and “bumped him” which caused Smith to hit the handle, which in turn moved the helicopter, which then “caught” plaintiff’s hand [Pages 103-104]. Smith called him and he ran over. He told Smith to take him to the hospital. Smith told him he thought plaintiff was drunk. He told Smith to ask the hospital to test his blood alcohol, but they refused [Page 84]. He waited at the job site until Smith and plaintiff came back from the hospital. They returned together around 1:30 p.m. He personally filled plaintiff’s prescription for painkillers at a nearby drugstore and he then sent plaintiff home [Page 90]. Plaintiff said he’d be back in a few weeks, but he did not return to work.

Defendants 57 Graham Corp. and CP & Associates’ Opposition to the Motion

Defendants oppose the motion with an affirmation from counsel, an affidavit from Joseph Caponigro, a licensed general contractor, and an affidavit from Roopnarine Saugh, (Smith) the foreman for Champ.

Counsel argues [in Paragraph 3 of his affirmation] that plaintiff has not made out a prima facie case for summary judgment, specifically, that the plaintiff’s papers contain testimony from people with “two diametrically opposed versions as to how the accident happened.” In addition, counsel claims plaintiff has not “shown by admissible evidence that this accident was caused by the effects of gravity.” Finally, he claims that “my client” is not shown to be a “proper Labor Law Defendant.”

Mr. Saugh's affidavit, dated October 17, 2017, states that he is a foreman for Champ, that he was a foreman at the job site on the day of plaintiff's accident, that plaintiff would not have been injured had he been wearing the safety gloves which were available to him, and that he had been instructed "many times" that safety equipment, "including gloves" must be worn at all times. In addition, he avers that the plaintiff was not injured while hoisting the equipment, and that if hoisting needed to be done, there was a proper hoist, that is, a pulley, attached to the scaffold for the workers to use.

Mr. Caponigro states in his affidavit that he is a licensed general contractor in New York. He reviewed the materials and EBTs in this matter, and "it is clear there are two completely different versions of how the accident took place." He summarizes plaintiff's testimony, Mr. Saugh's testimony, and Mr. Burdett's affidavit. He states that he totally disagrees with Mr. Burdett, as in his opinion, the accident was not caused by the effects of gravity on the helicopter, but was caused by the plaintiff "reaching past a guard on the machine, either when he was kneeling on the second level . . . or when he stuck his hand in past the guard while the machine was being held by workers on the ground and [workers] on the scaffold", and, in addition, "he was injured because he was not wearing safety gloves." He concludes that "there was no failure or fault by the defendants; they had the proper and necessary equipment and the accident was caused solely by the plaintiff."

With regard to counsel's last claim, that these defendants are not proper defendants in a cause of action for a violation of Labor Law §240 (1), counsel does not elaborate other than the above statement, and the court thus has no way to know the basis for this claim. These defendants are the owner of the property and the general contractor, and therefore are proper defendants for a claim under this section of the Labor Law.

Defendant Champ's Opposition to the Motion

Defendant opposes the motion with an affirmation from counsel and the same affidavit from Roopnarine Saugh, the foreman for Champ, which is included in defendants 57 Graham and CPA's opposition papers.

Counsel avers that the plaintiff's accident is not the kind of accident covered by Labor Law §240 (1), that the facts with regard to the happening of the accident are in dispute, and that plaintiff is barred by Workers' Compensation Law §11 from suing Champ, as he received Workers' Compensation benefits.

With regard to the last claim, counsel adopts and "incorporates by reference" the third-party defendants' opposition papers, papers which the court has determined that it need not read, as the third-party action was dismissed more than a month before this motion was argued and submitted. In that decision, dated September 11, 2017, the court determined that Champ did not purchase Workers' Compensation insurance for this job, and therefore, Champ had no valid cause of action against its insurance broker or the principal of the company. However, the court takes judicial notice of the papers submitted in connection with the motions for summary judgment in the third party action, and the exhibits annexed to the third-party defendants' opposition to this motion, in particular the 1/11/16 decision of the Workers' Compensation Board [Exhibit C] that states that, as Champ had no Workers' Compensation insurance, Da Silva was entitled to be paid by CPA's insurance company, as CPA was the general contractor for the job. This is pursuant to Workers' Compensation Law §56. Workers' Compensation Law § 56 places liability on the contractor nearest in the chain to the uninsured employer in order to encourage contractors to employ "only those subcontractors who have workers' compensation coverage, or face the financial risk themselves" (See *Matter of Begor v Holmes*, 71 AD3d 244, 248 [3d Dept 2010]; Minkowitz, Practice Commentaries, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 56, at 102).

Plaintiff's Reply

Counsel for plaintiff claims in his reply affirmation that the workers were hoisting the equipment at the time of the accident, and that the proper method of hoisting the equipment would have been a mechanical hoist, which was not provided and which the workers on the site had requested. He summarizes the affidavit of plaintiff's expert, Mr. Burdett, who opined that there were alternative methods which could have been employed if a mechanical hoist was not available, and he also argues that tag lines should have been employed to keep the piece of equipment steady. In addition, counsel points out that if plaintiff did bear some fault in the happening of the accident, such as failing to wear gloves, this does not prohibit the court from awarding summary judgment to him, as gloves are not a safety device which Labor Law §240 (1) enumerates. There is no response from counsel whatsoever to Champ's claim with regard to the bar of Workers' Compensation Law §11.

Discussion

First, the court wishes to address the procedural aspects to the motion. In particular, defendant Champ's claim that Workers' Compensation Law §11 bars plaintiff's suit as against Champ, his employer. Further, if CPA's obligation to provide the Workers' Compensation insurance as the general contractor, pursuant to §56 of the Workers' Compensation Law is what counsel for CPA is referring to in his affirmation, when he states "his client" is not a proper defendant," the court will address this as well.

The law in New York on this issue has been clear since 1946, when the Court of Appeals issued its decision in *Swezey v Arc Elec. Constr. Co.*, 295 NY 306 (1946): "Defendant contends that since the general contractor here is obligated to pay compensation to the injured employee of the subcontractor, the latter having failed to secure compensation insurance, the general contractor must be deemed to be an employer of the subcontractor's employees." *Id.* at 310. The Court of Appeals squarely rejected this argument: "[T]he liability of the [general] contractor to employees of his

subcontractor is a secondary one imposed upon him by law. That this does not cause the relationship of employer-employee to spring up has been recognized by this court . . . we do not feel that an intent to make the statutory liability imposed by Section 56 exclusive can be read into that section.” Id. at 311-12. That this is still good law was recently made clear in *Pina v Dora Homes, Inc.*, 2013 US Dist LEXIS 11763 [EDNY]. To the extent that CPA may be claiming that it is an improper defendant because it is obligated to cover plaintiff by the provisions of Workers’ Compensation Law §56, it is incorrect. (See also *Joyce v McKenna Assocs.*, 2 AD3d 592 [2d Dept 2003]).

With regard to Champ, while their argument has merit, unlike CPA’s argument, as Champ was the plaintiff’s employer, their answer fails to plead the bar of Workers’ Compensation Law §11 as an affirmative defense. In order for an employer to invoke the protection of that statute, it must plead it as an affirmative defense (see e.g. *De Oleo v Charis Christian Ministries, Inc.*, 94 AD3d 541, 542 [1st Dept 2012]; *Caceras v Zorbas*, 74 NY2d 884 [1989]; *Joyce v McKenna Assoc.*, 2 AD3d 592 [2003]; *Lanpont v Savvas Cab Corp.*, 244 AD2d 208 [1997]). Further, Champ has not made a motion to amend its answer, or, for that matter, a motion for summary judgment dismissing the action as against it. (See *Joyce v McKenna Assocs.*, 2 AD3d 592 [2d Dept 2003]).

Next, the court notes the legal standard which is applicable when considering a summary judgment motion. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a summary judgment motion will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce

evidentiary proof in admissible form sufficient to establish the existence of material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

Proponents of a motion for summary judgment must first demonstrate entitlement to judgment as a matter of law by tendering enough evidence to eliminate any material issues of fact (see *Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If this burden is met, the court must evaluate whether the issues of fact alleged by the opponent are genuine or if they are unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Spodek v Park Property Dev. Assocs.*, 263 AD2d 478 [2d Dept 1999]). “[A]verments merely stating conclusions of fact or of law are insufficient [to] defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily decided (*Andre*, 35 NY2d at 364).

Turning to the law applicable to this motion, Labor Law § 240 (1) states, in relevant part, that:

“All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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 enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder 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” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Thus, the purpose of Labor Law § 240 (1) is “to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see also *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross*, 81 NY2d at 501). Accordingly, Labor Law § 240 (1) is implicated in an injury that directly flows from the application of the force of gravity to an object or to the injured worker while performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]; see also *Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2d Dept 2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2d Dept 2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2d Dept 2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [4th Dept 1995]).

The duty to provide “proper protection” against elevation-related risks is nondelegable; therefore, owners and contractors are liable for the violations of their agents even if the owners or contractors have not exercised supervision and control over the subject work or the injured worker (*Rocovich*, 78 NY2d at 513). Lastly, this statute “is to be construed as liberally as may be” to protect workers from injury (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520-521 [1985], quoting *Quigley v Thatcher*, 207 NY 66, 68 [1912]; see also *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.* 18 NY3d 1, 7 [2011] [“a defendant’s failure to provide workers with adequate protection from reasonably preventable, gravity-related accidents will result in liability”]).

Here, there is no dispute as to whether defendants 57 Graham and CPA are subject to liability pursuant to Labor Law § 240 (1) as owners and/or contractors.

Therefore, if plaintiff has shown that the statute was violated and that the violation caused his injuries, he is entitled to partial summary judgment under this statute as against these defendants (*see e.g. Escobar v Safi*, 150 AD3d 1081, 1082 [upholding grant of summary judgment to plaintiff on Labor Law § 240 (1)], citing *Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 833 [2d Dept 2012] ["To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries"]).

While Labor Law § 240 (1) is intended to be liberally construed, a plaintiff's right of recovery must be within the parameters envisioned by the legislature. *Jastrzebski v North Shore Sch. Dist.*, 223 AD2d 677, 679; [2d Dept 1996], *affd* 88 NY2d 946; *Cannata v One Estate*, 127 AD2d 811, 813 [2d Dept 1987]; *DaBolt v Bethlehem Steel Corp.*, 92 AD2d 70, 75 [4th Dept 1983]. Therefore, the courts have interpreted Labor Law § 240 (1) to provide defendants with a "recalcitrant worker" defense to a statute that otherwise requires strict liability. *Jastrzebski v North Shore Sch. Dist.*, 223 AD2d 677, 679; *affd* 88 NY2d 946; *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993]. This defense is premised upon the principle that the statutory protection does not extend to workers who have adequate and safe equipment available to them but refuse to use it. *Jastrzebski v Dist.*, 223 AD2d 677, 679; *affd* 88 NY2d 946; *Smith v Hooker Chems. & Plastics Corp.*, 89 AD2d 361, 366 [4th Dept 1982]. While an injured worker's comparative negligence is not a defense to a Labor Law § 240 (1) cause of action, the "recalcitrant worker" defense may allow a defendant to avoid liability under the statute "where a plaintiff's own actions are the sole proximate cause of the accident" *Robinson v National Grid Energy Mgt., LLC*, 2017 NY App. Div. LEXIS 3716 [2d Dept]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *Doto v Astoria Energy II, LLC*, 129 AD3d 660, 662 [2d Dept 2015].

Turning to the facts of this case, the court finds that the affirmation of plaintiff's counsel, plaintiff's EBT transcript and Mr. Burdett's affidavit make out a prima facie

case that plaintiff is entitled to summary judgment on his Labor Law §240 (1) claim. However, he also includes the EBT transcripts of Champ's two witnesses, and by doing so, he undermined his motion. To be clear, plaintiff did not need Champ's EBTs to make out a prima facie case for summary judgment, but by including the transcripts, which provide testimony which contradicts plaintiff's claims, the court cannot say that he makes out a prima facie case (*See Alayer v Juster Assoc.*, 122 AD3d 886 [2d Dept 2014]).

Here, if the facts as alleged by Mr. Saugh are accurate, there is no viable claim under Labor Law §240 (1), while if the facts as alleged by plaintiff are accurate, there is a viable claim. Mr. Ciampone's third version of the events is not as relevant, as he did not witness the accident, except to the extent he seems to contradict his foreman's testimony. As long as the facts are in dispute, summary judgment cannot be granted.

It is Mr. Saugh's testimony that plaintiff was injured while he was standing on the ground, he was not working at a height, nor was he struck by a falling object. If these facts are accurate, although plaintiff's injury was tangentially related to the effects of gravity upon the machine he was helping to lift, "it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" (*Aloi v Structure-Tone, Inc.*, 2 AD3d 375, 376 [2d Dept 2003]). Similarly, in *Cardenas v BBM Constr. Corp.*, (133 AD3d 626, 627-628 [2d Dept 2015]), the court held that there was no Labor Law §240 (1) violation where plaintiff suffered a back injury while lifting a 500-pound beam approximately one and a half feet to attach it to a wall. The court noted that "the extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity' " (citations omitted) and that the plaintiff's injury was not caused by the elevation-related hazards encompassed by Labor Law § 240 (1); see *Zdunczyk v Ginther*, 15 AD3d 574, 574-575 [2005] [where the court held that the fact that the force of gravity was involved is not enough, by itself,

to support the plaintiff's Labor Law §240 (1) claim where he allegedly sustained injuries to his hand when, while assisting a co-worker in lowering a bucket of construction debris, the co-worker suddenly released the rope that the bucket was attached to].

As plaintiff has failed to make out a prima facie case for summary judgment, the court need not consider the papers submitted in opposition.

In conclusion, as there are clearly triable issues of fact as to how the accident happened, plaintiff's motion for partial summary judgment must be denied.

This constitutes the decision and order of the court.

ENTER :



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**