SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THEODORE WILSON and LYNDIA WILSON,

Plaintiffs,

-against-

DAVACO NCS, INC., MACY'S CORPORATE SERVICES, INC., MACY'S OF NEW YORK, MACY'S OF NEW YORK n/k/a MACY'S INC., MACY'S RETAIL HOLDINGS, INC., RALPH LAUREN CORPORATION, and RALPH LAUREN RETAIL, INC.,

Defendants,

Index No.: 150590/2015

DECISION/ORDER

Motion Seq. 001

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed | 1 |
| Opposition Affidavits/Affirmations and Memos of Law annexed | 2, 3 |
| Reply Affidavits/Affirmations/Memos of Law annexed | 4 |

***ERIKA M. EDWARDS, J.:***

Plaintiffs Theodore Wilson ("Plaintiff") and Lyndia Wilson (collectively "Plaintiffs") brought this action against Defendants Davaco NCS, Inc. ("Davaco"), Macy's Corporate Services, Inc., Macy's of New York, Macy's of New York n/k/a Macy's Inc., Macy's Retail Holdings, Inc. (collectively "Macy's"), Ralph Lauren Corporation, and Ralph Lauren Retail, Inc. (collectively "Ralph Lauren"), for personal injuries Plaintiff sustained when a strap broke around a stack of oak wood floor planks which Plaintiff and another worker were attempting to move on a hand jack without using a pallet base. Plaintiff stipulated to discontinue all claims against Davaco, but the co-defendants' cross-claims against Davaco remain. Plaintiffs' allege Defendants are liable for Plaintiff's accident under common-law negligence, res ipsa and violations of Labor Law §§ 200, 240(1) and 246(1).

Plaintiffs now move for partial summary judgment as to liability on their Labor Law § 240(1) claim against Defendants Macy's as the owner and Ralph Lauren as the contractor under motion sequence 001. Based on the evidence presented, despite Plaintiffs' expert report, the court denies Plaintiffs' motion and finds that Plaintiffs failed to demonstrate their entitlement to

summary judgment in their favor as a matter of law. Specifically, Plaintiffs failed to demonstrate that Plaintiff's injuries were caused by an elevation-related risk contemplated by Labor Law § 240(1), that they resulted from an extraordinary hazard associated with such elevation-related risk and not from an ordinary hazard incidental to a worksite, or that adequate safety devices were not provided or were inadequate.

Plaintiff was a construction laborer for True Blue Labor Ready temp agency. The agency had a contract with Davaco to provide temporary laborers to Davaco. Davaco had an agreement with Ralph Lauren to remove wooden dance floors from its display areas in 152 Ralph Lauren shops inside of 127 Macy's stores across the country. Plaintiff was assigned to work in the Ralph Lauren shop inside of a Macy's store located in Yonkers, New York. Davaco's employee directed Plaintiff to assist him with disassembling shelving racks, dismantling the oak floor planks and stacking them onto a hand jack for removal to a truck. It is undisputed that Davaco's employee directed, controlled and supervised Plaintiff's work and Davaco was responsible for controlling the means and methods of Plaintiff's work. However, it is unclear whether Davaco provided the hand jack or whether Macy's loaned Davaco its hand jack as a courtesy.

Plaintiff testified in substance that the Davaco employee directed him to remove the planks and load them onto the pallet jack. The planks varied in size, but each one averaged 2 to 3 inches thick, 2 to 3 feet wide, 3 feet long and weighed approximately 32 pounds. They stacked approximately 80 to100 planks about 7 ½ feet high. Plaintiff testified that he suggested that they make 4 to 5 trips with smaller loads and that they use a pallet on the bottom to stable the load, but the Davaco worker declined to do so. The Davaco worker attempted to move the jack as Plaintiff guided him. After only a couple of inches, Plaintiff heard the strap snap and the stack of wooden planks collapsed and fell onto Plaintiff, causing his injuries.

Plaintiff alleges that Macy's and Ralph Lauren violated their non-delegable duty toward Plaintiff by failing to provide adequate equipment to properly secure the load by using a pallet or pallets to secure the base, wrapping to prevent wobbling, slipping, shifting and movement of the load and by making multiple trips with smaller, more manageable and controllable stacks.

Macy's opposes the motion and argues in substance that Plaintiff's injury was not caused by a gravity-related incident contemplated by Labor Law § 240(1), as the incident occurred while Plaintiff was on the same level as the work site and it was an ordinary risk and not an extraordinary elevation-related risk envisioned by the statute. Additionally, Macy's argues that if the court determines that it is liable, then Ralph Lauren is equally liable as a statutory owner as the lessee of the premises. Macy's further argues that Ralph Lauren had an agreement with Macy's to install shop displays in Macy's stores, Ralph Lauren hired Davaco to remove the wooden dance floor from Ralph Lauren's shop display at this location and Ralph Lauren controlled Davaco's work. Therefore, Ralph Lauren is deemed an owner under the Labor Law.

Although Ralph Lauren did not file opposition papers, it moved for summary judgment dismissal of Plaintiffs' complaint, including Plaintiffs' Labor Law § 240(1) claim under motion sequence 003.

To prevail 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 admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Facts supported by admissible evidence must be viewed in the light most favorable to the non-movant.

Labor Law § 240(1) states that all contractors, 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" (Labor Law § 240[1]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

To succeed under Labor Law § 240(1), a plaintiff must demonstrate that the statute was violated and that the violation was the proximate cause of his injury (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). A plaintiff must also demonstrate that the injury sustained is the type of elevation-related hazard to which the statute applies, that there was a failure to use, or an inadequacy of, a safety device of a kind set forth in the statute and that the fall or the application of an external force was a foreseeable risk of the task being performed (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-268 [1st Dept 2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level, or the difference between the elevation level where the worker is positioned and a higher level of the materials or load being hoisted or secured (*Rocovich*, 78 NY2d at 514). However, application of the statute is not limited to situations where a worker fell or was struck by a falling object (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599 [2009]). Rather the relevant question is whether the harm flows directly from the application of the force of gravity to the object (*id.* at 604). Not all safety devices are contemplated by the statute. For example, the term "braces" set forth in the statute has been construed to mean the type used to support elevated work sites and not the ones designed to shore up or lend support to a completed structure (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]).

Absent an elevation differential which is not *de minimis*, the extraordinary protections of Labor Law § 240(1) are not implicated simply because the injury is caused by the effects of gravity upon an object, regardless of whether a device specified by the statute might have prevented the accident (*Narducci*, 96 NY2d at 270). However, Labor Law § 240(1) may still apply in situations where a worker is injured by a falling object whose base stands at the same level as the worker (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 5 [2011]). To determine whether an elevation differential is physically significant or *de minimis*, courts must consider the weight of a falling object and the amount of force it was capable of generating even over the course of a relatively short descent (*id.* at 10 [2011]; *Runner*, 13 NY3d at 603).

Numerous courts have held that injuries that result from usual and ordinary dangers which exist on a construction site and which do not result from an elevation-related hazard or appreciable height differential are not protected by Labor Law § 240(1) (*see Misseritti*, 86 NY2d at 491; *Makarius v Port Auth. of N.Y. & N.J.*, 76 AD3d 805, 807-808 [1st Dept 2010] [transformer that was affixed to the wall about 6 to 7 feet high fell and struck 5 foot 8 inch worker's head as worker stood on the same level]; *Whitehead v City of New York*, 79 AD3d 858 [2d Dept 2010] [worker was struck in the knee with two steel tubes after a load of steel tubes that had just been hoisted by a crane and put down on the floor rolled out while the bindings on the load were being removed]; *Daley v City of New York*, 277 AD2d 88 [1st Dept 2000] [worker struck by shackle handle that was propelled into his leg when a chain binder opened up which was holding a concrete slab that had been hoisted up to same level as worker]; *Amato v State*, 241 AD2d 400 [1st Dept 1997] [brace which was an integral part of a ground-level structure fell and hit a worker who was demolishing the structure on the same level]; *Dias v Stahl*, 256 AD2d 235 [1st Dept 1998] [worker demolishing structure on ground level struck by a section of air conditioning duct work suspended from a 10 foot high ceiling by metal support straps]; *Hebbard v United Health Servs. Hosps., Inc.*, 135 AD3d 1150 [3d Dept 2016] [a stack of about 30 scaffold frames about 6 feet long, 4 to 5 feet wide and 45 to 50 pounds each, standing vertically on the same level as the worker and about the same height as the worker, fell onto the worker when he was attempting to move one of the frames]; *Carrera v Westchester Triangle Hous. Dev. Fund Corp.*, 116 AD3d 585 [1st Dept 2014] [worker slipped on a muddy surface and tripped over an object while he and two others were carrying a metal pipe on their shoulders]; *Wilinski,* 18 NY3d 1 [vertical metal pipes which were 4 inches in diameter and stood 10 feet high fell 4 feet onto a 5 foot 6 inch worker]); *Miles v Buffalo State Alumni Assn., Inc.*, 121 AD3d 1573 [4th Dept 2014] [drywall, which was loaded onto a cart and not being hoisted or secured, toppled over and struck

worker who was unloading cart while standing on same level]; and *Joseph v City of New York*, 143 AD3d 489, 490 [1st Dept 2016] [unsecured vertical pipe swung out and struck worker as pipe was being cleaned by a highly pressurized flush mixture that was intentionally propelled through the pipes].

When applying the applicable law to the facts in this case, the court determines that Plaintiffs failed to demonstrate that they are entitled to partial summary judgment as a matter of law as to liability on their Labor Law § 240(1) claim against Macy's and Ralph Lauren. As an initial matter, the evidence demonstrates that Macy's and Plaintiff stipulated that Macy's Retail Holdings, Inc. owned the premises. Therefore, Plaintiffs failed to demonstrate that the other Macy's Defendants were owners of the premises. Additionally, Macy's correctly noted that Ralph Lauren was also a statutory owner of the premises, but Plaintiffs failed to establish that Ralph Lauren was an owner or contractor, or which entity was an owner or contractor for liability under Labor Law § 240(1).

Additionally, Plaintiffs failed to establish as a matter of law that the accident was caused by an elevation-related or gravity-related risk from an appreciable height differential as contemplated by Labor Law § 240(1), that the injury resulted from an extraordinary hazard associated with such elevation-related risk and not an ordinary hazard incidental to a worksite and that adequate safety devices were not provided or were inadequate. Plaintiff was injured while assisting in moving a load of wooden floor planks horizontally on the same level as Plaintiff and not while it was being hoisted or secured. There was no appreciable height differential between the top of the stack of wood planks and Plaintiff's head, although Plaintiff's height is unclear. Therefore, the harm did not flow directly from the application of the force of gravity to the planks. Additionally, the nylon strap used to attempt to secure the load and the wrapping and pallet discussed by Plaintiff were not the type of devices contemplated by the statute to support elevated worksites which would have prevented an injury caused by an elevated-related hazard. Rather, they were devices used, or which could have been used, to shore up or lend support to the stack. As such, Plaintiff's injuries were caused by the usual and ordinary dangers which exist on a construction site and are not protected by Labor Law § 240(1).

Accordingly, it is hereby

**ORDERED** that under motion sequence 001, the court denies Plaintiffs Theodore Wilson's and Lyndia Wilson's motion for partial summary judgment as to liability on their Labor Law § 240(1) claims against Defendants Macy's Corporate Services, Inc., Macy's of New York, Macy's of New York n/k/a Macy's Inc., Macy's Retail Holdings, Inc., Ralph Lauren Corporation, and Ralph Lauren Retail, Inc. with prejudice and without costs.

Date: January 17, 2018

HON. ERIKA M. EDWARDS