SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART 43**

Justice

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GREGORY MCNEIL, MONIQUE MCNEIL,

Plaintiff,

- v -

HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C., BOP WEST 31ST STREET LLC., BROOKFIELD PROPERTIES W33RD CO. L.P., NAVILLUS TILE, INC., INDIVIDUALLY AND DOING BUSINESS AS NAVILLUS CONTRACTING, NAVILLUS CONTRACTING, BOP NE LLC.

Defendant.

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INDEX NO. 158146/2015

MOTION DATE 04/26/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is granted in part and denied in part.

This is an action to recover damages for personal injuries allegedly sustained by a surveyor on August 3, 2015 when he, while working onsite, fell a distance of over 40 feet from the second floor of a building under construction at 401 West 31st Street in Manhattan. Plaintiffs – the surveyor and his spouse, derivatively – move, pursuant to CPLR 3212, for summary judgment on the issue of liability under Labor Law 240 (1). [*As the surveyor's spouse's claims in this action are derivative only, any references hereafter to "plaintiff" in the singular should be read to mean "the surveyor."] Defendants – the general contractor, the purported property owners, and an onsite contractor – all oppose the motion.

BACKGROUND

On the day of the accident, plaintiff was, as part of his surveying duties in connection with the construction of a 65-floor residential building, assigned to take measurements of the leading edge of the concrete on the project's second floor. The area in which plaintiff was

working included what defendants refer to as "perimeter protection" – consisting of four wire cables along the exterior of the floor, together with netting outside and beneath the floor's outer edge. Plaintiff describes that same wire cable system as a "guardrail," and avers that the cable/netting system "guardrail" should be considered an employee safety device within the meaning of the Labor Law. Defendants, however, assert that what they describe as "perimeter protection" was designed and intended to protect pedestrians on the sidewalk below from falling debris and/or tools – and not to protect workers at the construction site from any elevation-related hazard. In any event, as plaintiff was taking measurements, he leaned (lightly, he says) on one of the stated wire cables. When plaintiff did so, the eye bolt securing the cable to a column broke away or otherwise failed, causing the cable system to collapse. As a result, plaintiff, who was not at that time wearing any safety harness, lost his balance and fell over 40 feet to the ground below, sustaining what he alleges are serious and permanent injuries.

The record evidence is conflicting regarding the actual purpose of the wire cable system. The general contractor's site safety manager steadfastly maintained at deposition that the wire cables were not provided for worker safety – testifying that, in fact, such cables were specified to bear only up to 200 lbs., and, thus, could not as a practical matter be considered "adequate fall protection." The general contractor's site safety manager further testified that worker safety against elevation-related hazards at the project site was ensured by providing training in the use of safety harnesses, with lanyards, tied off to appropriate anchorage points – and then by having those workers follow that training in practice. The deposition testimony of multiple other witnesses, however, suggested that those witnesses understood the purpose of the wire cable system (together with the netting) was at least in part to protect workers from falling. Notably, the general contractor's project safety director described the purpose of what he termed "fall

protection cables" thusly: "Whenever you have a floor opening or a wall opening, a perimeter opening that is higher than 6 feet, it is required to have cables, stanchions, some sort of device that will prevent someone from falling over and out of building or into a hole." Plaintiff testified that in the two or three weeks he worked on the construction site that he had never used the safety harness and lanyard, based on his understanding that he only would be required to utilize those items where the wire cable system, with netting (or "guardrail," per plaintiff's description), was not in place. A witness testifying on behalf of plaintiff's employer, moreover, stated his understanding that the presence onsite of the wire cable system "negated the need" for plaintiff to wear a safety harness. In addition, in his reply papers, plaintiff submits a still image from a videotape of the general contractor's safety orientation shown to plaintiff that depicts (1) the wire cable system, (2) a worker putting weight on the top cables, (3) with no evidence in the video still that the worker is wearing any safety harness, or (4) that the worker in the image is somehow otherwise attached to any anchorage point.

Plaintiff acknowledges (a) that he received training in the use of a safety harness, with lanyard, (b) that his employer provided a safety harness and lanyard to him, (c) that, on the day of the accident, he left his safety harness and lanyard in his truck, and (4) that he, thus, was not wearing the safety harness and lanyard when his fall occurred. Defendants argue that it was incumbent upon plaintiff to follow his safety training and to use the safety harness and lanyard that were made available to him by his employer and that were in fact readily available to plaintiff on the day of his accident. The general contractor's site safety manager testified at his deposition that since plaintiff was exposed to the potential fall of six feet or more at the time of his accident, he should have been wearing a safety harness and a lanyard attached to an anchorage point. That same site safety manager, however, when asked toward the end of his

deposition the question "Do you know of any anchorage points on the second floor where [plaintiff] had his accident?," responded, "Not that I know of." The site safety manager explained that plaintiff could have "tied off" to a nearby column. The record evidence does not support that plaintiff received specific instructions or training on how or where to attach his safety harness and lanyard to suitable columns in the event an anchorage point was not nearby.

Finally, the purported property owners deny in their verified answer that they owned the premises at 401 West 31st Street at the time of the accident, and they dispute that any specific item in plaintiff's moving papers establishes their ownership of the accident site. They note that plaintiff appears to rely upon demonstrably erroneous language in a "whereas clause" in a subcontract related to the construction of the project to extrapolate proof of the premises' ownership. In his reply, plaintiff argues that the purported property owners have "fail[ed] to prove their lack of ownership in the subject premises through documentary or otherwise admissible evidence."

DISCUSSION

"It is well settled that 'the 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 demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *(Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851, 853). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554).

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant part, as follows:

"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."

"Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured from harm directly flowing from the application of . . . gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501] [emphasis omitted]). To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that such violation was a proximate cause of the plaintiff's injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287).

"Where a 'plaintiffs actions [are] the sole proximate cause of his injuries, . .. liability under Labor Law § 240 (1) [does] not attach'" (*Robinson v E. Med. Ctr., LP*, 6 NY3d 550, 554 [citation omitted]). In other words, a worker may be found to be the sole proximate cause of an injury "if adequate safety devices are available at the job site, but the worker either does not use or misuses them" (*id.*). "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he was expected to use them but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88; *accord Montgomery v Federal Express Corp.*, 4 NY3d 805, 806; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40).

Plaintiff was at the time of his accident manifestly a "covered individual" engaged in "protected activity" under section 240 (1). In the absence of proof of the availability of some

other safety device, his fall, moreover, would certainly seem to have been caused at least in part by the collapse of the wire cable on which he was leaning at the time. Defendants argue that there is an issue of fact as to whether the "perimeter protection system" was ever intended to be an employee safety device. In arguing affirmatively that the only intended employee safety device was the safety harness with lanyard available to plaintiff – including the instruction provided in relation to the use of those items – defendants, however, fail to address the lack of identifiable anchorage points in the vicinity of plaintiff's accident on the day of the accident (*see Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 402, 403 [finding that defendants failed to "sufficiently refute( ) plaintiff's testimony that there was no place for him to tie off the harness"]; *Hoffman v SJP TS, LLC,* 111 AD3d 467, 467 [finding that "while plaintiff was wearing his safety harness, there was no appropriate anchorage point to which the lanyard could have been tied-off"]). Nor do defendants provide any evidence that plaintiff was provided specific instructions on how and where to "tie off" to a nearby column when an identifiable anchorage point was not present (*see, e.g., Ortiz v 164 Atlantic Avenue, LLC*, 77 AD3d 807, 809). In this court's assessment, the Labor Law does not anticipate that workers will be required to improvise when attempting to follow safety instructions (*id.* ["The availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures."] [quotations omitted]. That plaintiff may have acted imprudently in leaning on a wire cable on the otherwise open edge of the second floor does not prevent him from seeking the protections of the Labor Law (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 ["where the owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related

injuries and that failure is a cause of plaintiff's injury, [n]egligence, if any, of the injured worker is of no consequence"]).

Premises Ownership

Plaintiff must establish each element of her claim against each defendant. He has failed to establish by competent, admissible evidence that there is no material issue of fact regarding which entities owned the subject premises at the time of the accident. The burden is his. It does not fall to the purported owners unless plaintiff first carries his burden. Plaintiff has failed to carry his burden prima facie on the question of premises ownership.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in his favor and against all defendants, pursuant to CPLR 3212, on the issue of liability under Labor Law 240 (1) is granted in part and denied in part, insofar as it is

ORDERED that plaintiff is entitled to and is hereby granted judgment on the issue of liability in his favor, pursuant to CPLR 3212, on his claim under Labor Law 240 (1) as against defendants Hunter Roberts Construction Group, L.L.C., and Navillus Tile, Inc., individually and doing business as Navillus Contracting, and Navillus Contracting, while it is

ORDERED that plaintiff is not entitled to any ruling in his favor, pursuant to CPLR 3212, on his claim under Labor Law 2401 (1) as against defendants BOP West 31st Street LLC, Brookfield Properties W33rd Co. L.P., and BOP NE LLC.

3/14/2019
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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