SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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INDEX NO. 162925/2015

JAMES KELLY,

MOTION DATE 11/26/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

HIRO REAL ESTATE L.L.C., MOUNT SINAI HEALTH SYSTEM, INC.,J.T. MAGEN & COMPANY INC.,150 E. 42 REALTY LLC,AM 150 E. 42 REALTY LLC,150 VENTURE BORROWING LLC,150 TIC BORROWING LLC,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents, it is

Motion for summary judgment is denied. Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320 324 [1986]). 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 eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion

must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff claims that on April 16, 2015 he was injured in a gravity related accident in violation of Labor Law § 240 (1) when he fell from a scaffolding that was not (1) properly balanced, (2) equipped with guardrails, and (3) equipped with outriggers and injured his back and leg. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 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."

"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 worker from harm directly flowing from the application of the force of gravity to an object or person'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001].

Here, plaintiff has me his *prima facie* burden of establishing that he was injured in a gravity related accident. Specifically, in support of the motion plaintiff has submitted his deposition where plaintiff testified that:

> I proceeded to go up the scaffold onto the scaffold with him. We lifted the board up, Chris got unstable because the scaffolding moved. He lost control of the board. I tried to hold the board. The board snapped over my head. I fell off the scaffold, the scaffold was going into the trough. I tried to maneuver myself without falling. I wound up falling -- one leg was still on the scaffold, one leg was on the ground and that was when I hurt my back. I felt a pop in my back and my leg. I also hurt my leg at the same time.

However, to prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v*

Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]). Thus, "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 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

Here, the record contains certain documents that call into question the veracity of plaintiff's deposition testimony. On April 19, 2015, in a workmens' compensation information form for Orange Urgent Care, plaintiff stated that the injury occurred "lifting sheetrock to do ceiling." Similarly, Plaintiff's employee claim form filed with the State of New York – Workers' Compensation Board (dated May 5, 2015) states "How did the injury/illness happen? While putting up a ceiling with my co-worker, I went to pass him the board, (he was not looking) and the board slipped and caused me to twist my back." Further, in describing how the injury occurred, a medical report from Hudson Valley Neurological Associates states that plaintiff "was on a scaffold holding a large piece of sheet rock when his partner let go and Mr. Kelly felt a "pop" in his back." Finally, in the first Bill of Particulars, the circumstances of the injury are described as having occurred when plaintiff was "standing with his partner on a baker scaffold, lifting a 12 foot piece of sheet rock, each holding one end, when his partner lost his grip on the sheet rock causing the scaffold to move which in turn caused plaintiff to twist to prevent himself and his partner from falling off the scaffold and hitting the electricians standing in the immediate vicinity." In none of these documents does plaintiff allege any facts that describe a gravity

related accident. In none of the documents does plaintiff mention a fall and in three of documents, plaintiff does not mention any injury to his leg/knee. In fact, the Hudson Valley Neurological Associates report indicates that plaintiff's injured back was the result of plaintiff's partner letting go of the sheetrock and the first Bill of Particulars indicates that plaintiff prevented any fall.

Plaintiff is not entitled to summary judgment as to liability on the claim under section 240 (1) as the records of his medical treatment create an issue of fact as to whether his injury was incurred in the manner described in his testimony (*Gutierrez v Harco Consultants Corp.*, 157 AD3d 537 [1st Dept 2018]). Further, the apparent contradictions and omissions in the aforementioned documents, as compared to his deposition testimony, creates an issue of fact and calls into question the creditability of his deposition testimony (*Medrano v Port Auth. of New York*, 154 AD3d 521 [1st Dept 2017]). Similarly, even though the fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment in its favor; where a plaintiff is the sole witness to an accident, an issue of fact may exist where he or she provides inconsistent accounts of the accident, the account of the accident is contradicted by other evidence or if plaintiff's credibility is otherwise called into question with regard to the accident (*see Smigielski v Teachers Ins. and Annuity Ass'n of Am.*, 137 AD3d 676 [1st Dept 2016]). It is therefore ORDERED that plaintiff's motion for summary judgment is denied.

4/11/2019
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

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

162925/2015 KELLY, JAMES vs. HIRO REAL ESTATE L.L.C.
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