SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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DAVID MORERA,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, GEORGE COMFORT & SONS, INC, WWP OFFICE, LLC,

Defendant.

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INDEX NO. 157570/2014

MOTION DATE 06/11/2018

MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 137, 138, 139, 140, 141, 142, 143, 144, 158, 194

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff moves for partial summary judgment against George Comfort & sons Inc., ("George") and WWP OFFICE, LLC., ("WWP") pursuant to Labor Law §240(1). Defendant WWP is the owner of the subject premises known as 825 8th Avenue New York, NY. Defendant GEORGE was hired to manage the subject premises. Defendants WWP and GEORGE hired third-party defendant FIRST QUALITY MAINTENANCE II, LLC., ("FQM") to perform maintenance and window cleaning services at the subject premises. Plaintiff was employed as a window washer by FQM.

On February 1, 2014, plaintiff was instructed to clean the windows in the area near the subway in preparation for a super bowl party which was being held in the building. This was a special request made by a tenant of the building. Plaintiff was provided a sectional ladder, approximately 24' in height to perform his work. According to the record, Plaintiff placed the ladder against the wall below the window and a co-worker held the bottom of the ladder. While plaintiff was cleaning the window, a piece of ceiling tile fell from the ceiling above him and

struck him and the top of the ladder began to tip backwards away from the wall. As a result, the ladder fell backwards against the opposite wall from where plaintiff was working, and the plaintiff fell to the ground below. Plaintiff alleges that defendants failed to provide him with any safety devices to prevent his fall from the ladder.

In support of this motion, plaintiff refers to the affidavit of Certified Site Safety Manager, Kathleen Hopkins, who opines that defendants violated Labor Law § 240, and that this violation was a direct substantial, and proximate cause of plaintiff's accident and injuries. Specifically, plaintiff argues that the failure to provide him with adequate protection to prevent his fall caused him to sustain serious injuries and as such, he is entitled to partial summary judgment on liability pursuant to Labor Law §240 (1).

Third-Party FQM opposes the motion asserting that at all times and specifically at the time of his accident, plaintiff was working on a non-defective ladder. According to FQM, plaintiff has conceded that the ladder was not defective and did not cause his accident but that the accident occurred when a tile fell from the ceiling causing him to fall backward.

FQM argues that in order for plaintiff to successfully demonstrate his entitlement to summary judgment under labor Law § 240 (1), he must demonstrate that additional or different safety devices were required. FQM says that plaintiff cannot demonstrate this, because all appropriate and required safety devices for the work being performed had been provided to plaintiff. Further FQM argues that the sudden falling of a ceiling tile, without any warning, severed any arguable proximate cause between any purported negligence on the part of FQM and plaintiff's accident.

FQM claims that an issue of fact exists as to whether Labor Law § 240(1) was statutorily violated and whether any supposed violation of this Labor Law Section was the proximate cause of plaintiff's accident.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.,* 68 NY2d 320 (1986). The party moving for summary judgment must make a showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. *Winegrad v. New York Univ. Med. Ctr.,* 64 NY2d 851 (1985). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Smalls v. AJI Indus. Inc.,* (2008). Once a prima facie showing has been mad, however, "the burden shifts to the nonmoving party to produce evidentiary form sufficient to establish the existence of material issues of fact that require a trial for resolution. *Giuffrida v. Citibank Corp.,* 100 NY2d 81 (2003

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist not to determination the merits of any such issues. *Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 (1957). The Court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Negri v. Stop &Shop, Inc.,* 65 NY2d 625 (1985). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders Inc. v Ceppos,* 46 NY2d 500 (1978).

Labor Law § 240 (1), known as the "scaffold" law imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction. *Ross v. Curtis-Palmer Hydro-Elec Co.,* 81 NY2d 494 (1993).

To establish liability under Labor law § 240 (1), the injured plaintiff must demonstrate a violation of the statute, and that such violation was the proximate cause of his injuries. *Blake v. v. Neighborhood Hous. Serv.,* 1 NY3d 280 (2003). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site, and comparative negligence may not be asserted as a defense *Sharp v. Scandic Wall Ltd. Partnership.* 306 AD2d 39 (2003). Notwithstanding that section 240 (1) is an absolute liability statute, if a plaintiff's actions were the sole proximate cause of the accident there is no liability. *Cahill v. Triborough Bridge & Tunnel,* 4 NY3d 604 (2004).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Ross,* 81 NY2d at 501. In *Runner v. New York Stock Exchange, Inc.* 13 NY3d 599 (2009, however, the Court of Appeals clarified that the dispositive inquiry does not depend upon whether the injury resulted from a "falling worker" or "falling object". According to Runner, "the governing rule is that Labor law § 240 (1) was designed 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" *quoting Ross,* 81 NY2d 501.

In the case at bar, issues of fact exist which preclude the granting of summary judgment. First, there is an issue as to whether there was a statutory violation of Labor Law §240 (1). According to plaintiff's testimony, he was given the appropriate ladder with which to perform his window washing, in addition to the requisite cleaning tools and a spotter, who held the base

of the ladder at all times plaintiff was working on it. It appears that plaintiff was provided with all of the appropriate and required safety devices with no additional or different devices, including fall protection, having been required or appropriate. An issue of fact exists as to whether plaintiff has shown that he was not provided with the proper and necessary safety devices required for a finding of liability under Labor Law §241(1).

There is also an issue of fact as to the proximate cause of plaintiff's accident. Plaintiff claims that defendants violated Labor Law § 240 (1). And that this violation was a proximate cause of his accident. However, there has been no evidence or proof to support this assertion and no evidence that the presumed violation was the proximate cause of plaintiff's accident.

Defendant FQM argues in opposition to the motion, that the falling of a ceiling tile, which occurred without warning, was the proximate cause of the plaintiff's accident. Plaintiff testified that the ladder did not cause his accident but rather it was the unexpected falling of a ceiling tile. This also creates an issue of fact as to whether liability can be found against defendants under Labor Law § 240 (1).

It has been held that when an event occurs that amounts to an intervening act which supersedes an alleged violation of Labor Law §240(1), it severs the causal connection between the alleged violation (of the Labor Law) and a plaintiff's accident thus precluding any finding of proximate cause. *Hajderlli v. Wiljohn,* 24 Misc3d 1242(A). "An intervening act is deemed a superseding causes of the injury so as to relieve the defendants of liability if it is of such an extraordinary nature or so attenuates defendants' negligence from the ultimate injury that it may not reasonable be attributed to the defendants". Whether or not the falling ceiling tile herein was an intervening act that amounts to a superseding cause of plaintiff injuries is an issue of fact that

must be determined by the trier of fact. An issue of fact as to the proximate cause of plaintiff's accident.

Based upon the above, the motion is denied and summary judgment is denied.

6/14/19
DATE

W. FRANC PERRY, 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