Jara v City of New York
2019 NY Slip Op 31718(U)
May 29, 2019
Supreme Court, Kings County
Docket Number: 520546/2017
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on May 29, 2019.

PRESENT:
HON. DAWN JIMENEZ-SALTA,
Justice.

----------X

LUIS O. JARA,

Plaintiff,

-against-

Index No.: 520546/2017

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION and NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY

DECISION AND ORDER

Defendants.

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:
1) Plaintiff Luis O. Jara's ("Plaintiff" or "Jara") Notice of Motion for Summary Judgment Pursuant to *CPLR 3212* with Exhibits and Memorandum of Law, Granting Partial Summary Judgment on Liability Against All Defendants, Pursuant to *Labor Law Section 240(1)* and for Such Other Further Just and Proper Relief by the Court, dated October 5, 2018;
2) Defendants City of New York ("City"), New York City Department of Education ("NYCDOE") and New York City School Construction Authority's ("NYCSCA") (collectively "Defendants") Affirmation in Opposition with Exhibits, dated November 15, 2018;
3) Plaintiff Jara's Reply Affirmation with Exhibits, dated December 17, 2018, all of which submitted on December 19, 2018.

Papers	Numbered
Order to Show Cause and Affidavits.....	
Notice of Motion	Plaintiff 1, Exhibits A-P
Cross Motion	
Answering Affidavit.....	Defendants Opposition 3, Exhibits A-D Plaintiff Reply Affirmation 4, Exhibits A-B
Supplemental Affidavits.....	
Exhibits.....	
Other	Plaintiff 2 Memorandum of Law

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows: This Court denies Plaintiff Luis O. Jara's motion pursuant to *CPLR 3212* for partial summary judgment on liability against Defendants City of New York, New York City Department of Education and New York City School Construction Authority pursuant to *Labor Law Section 240(1)* because it is premature [Plaintiff 1, Exhs. A-P; Plaintiff 2

Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

BACKGROUND, PROCEDURAL HISTORY
AND ARGUMENTS

This action is for personal injuries sustained by Plaintiff Luis O. Jara ("Jara") on December 27, 2016 at P.S. 77, 62 Park Place, Brooklyn, New York when bricks were allegedly improperly secured as they were hoisted to an elevated scaffold. The bricks fell, causing injuries to Plaintiff. The City of New York ("City") and New York City Department of Education ("NYCDOE") owned and operated the property located at 62 Park Place, Brooklyn, New York. The New York City School Construction Authority ("NYCSCA"), a public benefit corporation organized under the laws of the State of New York awarded a contract to Plaintiff Jara's employer, Cinalta Construction Corp., ("Cinalta"). Cinalta was to perform exterior masonry, flood elimination as well as window, parapet and roof work at that location [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Plaintiff served a Notice of Claim on March 23, 2017 upon the City, NYCDOE and NYCSCA (collectively "Defendants") [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

The action was commenced with the filing and service of a Summons and Complaint on October 24, 2017. Issue was joined by the service of Verified Answers on behalf of Defendant NYCSCA on November 21, 2017 and Defendants City and NYCDOE on May 18, 2018 [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Plaintiff testified at a *50-h* hearing on May 26, 2017 [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Terrier Claims Services ("Terrier Claims") performed an investigation of the accident scene on behalf of Defendants on December 28, 2016, one day after the accident. Its report, dated January 11, 2017 detailed the investigators' inspection of the accident scene, including the canvas basket lifting mechanism. There were also interviews with five (5) Cinalta employees, including Plaintiff, two eyewitnesses, Joseph Nieto ("Nieto") and Jesus Tapia ("Tapia"). Terrier Claims also interviewed three additional Cinalta employees who did not witness the accident but were involved in the post-accident events. Those Cinalta employees were Cinalta Project Labor Foreman Roger Bowan ("Bowan"), Cinalta's Project Supervisor Frank Arcuri, Jr. ("Arcuri"), and Cinalta's Local 79 Labor Shop Steward Luis Paucay Naula ("Naula") [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Cinalta's Project Supervisor Frank Arcuri, Jr. prepared a Workers' Compensation Employer's Report of Work-Related Injury, dated December 27, 2016, the date of the injury [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Plaintiff Jara filed a Workers' Compensation Employee Claim Report, dated January 3, 2017 [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

In his Notice of Summary Judgment Motion pursuant to *CPLR 3212* for Partial Summary Judgment on Liability, dated October 5, 2018, Plaintiff argues that his motion should be granted based upon his *Labor Law Section 240(1)* claims against all Defendants due to their failure to follow the statute. He insists that the breach of *Labor Law Section 240(1)* was the proximate cause of the accident. He contends that his motion is not premature

because of the futility of further discovery uncovering any evidence inconsistent with the manner in which the accident occurred. See *Sanatass v. Consolidated Investing Co., Inc.*, 10 NY3d 333, 858 NYS2d 67 (2008); *Ross v. Curtis-Palmer Hydro-Elec., Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 (1993); *DeHaen v. Rockwood Sprinkler Co.*, 258 NY 350, 179 NE 764; *Rocovich v. Consolidated Edison, Co.*, 78 NY2d 509, 577 NYS2d 219 (1991); *DelVecchio v. State of New York*, 246 AD2d 498, 667 NYS2d 401 (2nd Dept., 1998); *Misseritti v. Mark IV Constr. Co.*, 86 NY2d 487, 634 NYS2d 35 (1995); *Paredes v. 1668 Realty Associates, LLC*, 110 AD3d 700, 972 NYS2d 304 (2nd Dept., 2013); *Mendoza v. Bayridge Parkway Associates, LLC*, 38 AD3d 505, 831 NYS2d 485 (2nd Dept., 2007); *Baker v. Barron Educational Service Corp.*, 248 AD2d 655, 670 NYS2d 587 (2nd Dept., 1998); *Narducci v. Manhasset Bay Associates*, 96 NY2d 259, 727 NYS2d 37 (2001); *Rudnik v. Brogor Realty Corp.*, 45 AD3d 828, 847 NYS2d 141 (2nd Dept., 2007); *Blake v. Neighborhood Housing Services of New York City*, 1 NY3d 280, 771 NYS2d 484 (2003); *Sung Kyu-To v. Triangle Equities, LLC*, 84 AD3d 1058, 923 NYS2d 628 (2nd Dept., 2011); *Laquidara v. HRH Const. Corp.*, 283 AD2d 169, 724 NYS2d 53 (1st Dept., 2001); *Parisi v. Leppard*, 237 AD2d 419, 655 NYS2d 546 (2nd Dept., 1997); *Avant v. Cepin Livery*, 74 AD3d 533, 904 NYS2d 381 (2nd Dept., 2010); *Garcia v. Lenox Hill Florist III, Inc.*, 120 AD3d 1296 (2nd Dept., 2014); *Norero v. 99-105 Third Avenue Realty, LLC*, 96 AD3d 727, 945 NYS2d 720 (2nd Dept., 2012) [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

In their Affirmation in Opposition, dated November 15, 2018, Defendants City, NYCDOE and NYCSCA emphasize that Court of Appeals and Second Department decisions require the denial of Plaintiff's motion as premature because it is a *Labor Law Section 240(1)* case. In particular, they take issue with the fact that the depositions of five non-party witnesses, Jesus Tapia, Joseph Nieto, Frank Arcuri, Roger Bowan and Luis Paucay Naula have not yet occurred. They claim that the inconsistencies of Mr. Tapia's and Mr. Nieto's statements with Plaintiff's version of the accident require denial of the motion. Moreover, Defendants argue that Plaintiff failed to prove that they are subject to *Labor Law Section 240(1)* liability[1]. See *Hawana v. Carbuccia*, 164 AD3d 563 (2nd Dept., 2018); *Ingram v. Bay Ridge Automotive Management Corp.*, 145 AD3d 672 (2nd Dept., 2016); *Brea v. Salvatore*, 130 AD3d 956 (2nd Dept., 2015); *Chandler v. Eagle Sanitation, Inc.*, 153 AD3d 658 (2nd Dept., 2017); *Ryo v. Minerva*, 290 AD2d 434 (2nd Dept., 2002); *In re Fasciglione*, 73 AD3d 769 (2nd Dept., 2010); *Somereve v. Plaza Construction Corp.*, 31 NY3d 936 (2018); *Groves v. Land's End Housing Co., Inc.*, 80 NY2d 978 (1992); *Antonyshyn v. Tishman Const. Corp.*, 153 AD3d 1308 (2nd Dept., 2017); *Churaman v. C&B Elec., Plumbing & Heating, Inc.*, 142 AD3d 485 (2nd Dept., 2016); *Schlicting v. Elliquence Realty, LLC*, 116 AD3d 689 (2nd Dept., 2014); *Harvey v. Nealis*, 61 AD3d 935 (2nd Dept., 2009); *Afzal v. Board of Fire Commissioners of Bellmore Fire Dist.*, 23 AD3d 507 (2nd Dept., 2005); *Heath v. County of Orange*, 273 AD2d 274 (2nd Dept., 2000); *Hoxha v. City of New York*, 265 AD2d 379 (2nd Dept., 1999); *Seales v. Trident Structural Corp.*, 142 AD3d 1153 (2nd Dept., 2016); *Fabrizi v. 1095 Ave. Of Americas, LLC*, 22 NY3d 658 (2014); *Moncayo v. Curtis Partition Corp.*, 106 AD3d 963 (2nd Dept., 2013); *Podobedov v. East Coast Construction Group, Inc.*, 133 AD3d 733 (2nd Dept., 2015); *Wysk v. New York City School Construction Authority*, 87 AD3d 1131 (2nd Dept., 2011); *Pazmino v. 41-50 78th Street Corp.*, 139 AD3d 1029 (2nd Dept., 2016); *Gonzalez v. TJM Construction Corp.*, 87 AD3d 610 (2nd Dept., 2011); *Harinarain v. Walker*, 73 AD3d 701 (2nd Dept., 2010); *Roberts v. General Electric Co.*, 97 NY2d 737, 742 NYS2d 188, 768 NE2d 1127; *Donnelly v. City of Niagara Falls*, 5 AD3d 1103, 773 NYS2d 631 (4th Dept., 2004); *Fried v. Always Green, LLC*, 77 AD3d 788 (2nd Dept., 2010); *Galvin v. Triborough Bridge and Tunnel Authority*, 29 AD3d 517 (2nd Dept., 2006); *Carlton v. City of New York*, 161 AD3d 930 (2nd Dept., 2018); *Garbett v. Wappinger Central School District*, 160 AD3d 812 (2nd Dept., 2018); *Robinson v. National Grid Energy Management LLC*, 150 AD3d 910 (2nd Dept., 2017); *Lodato v. Greyhawk North America LLC*, 39 AD3d 491 (2nd Dept., 2007); *Nienajadio v. Infomart New York LLC*, 19 AD3d 384 (2nd Dept., 2005); *Russin v. Picciano & Son,*

[1]This Court notes that Defendants did not independently move to strike the *Labor Law Section 240(1)* claims against them [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

54 NY2d 311 (1981); *Paris v. Reiss,* 251 AD2d 1016 (4th Dept., 1998) [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Defendants emphasize that Plaintiff has no proof of any *Labor Law Section 240(1)* violation because Plaintiff simply relies upon his counsel's unsupported and conclusory statements which are inadmissible hearsay. The non-party witnesses' unsworn statements as well as the Terrier Claims report which Plaintiff submits are inadmissible evidence. Since the Workers Compensation Accident Report is uncertified, they argue that it is inadmissible. Consequently, Defendants claim that Plaintiff's counsel's conclusory statements about no provision of safety devices does not establish that *Labor Law Section 240(1)* was violated. As a result, they contend that there is no admissible evidence about how the accident happened since the affidavits of Mr. Arcuri and Defendants' Construction Safety Expert, Martin R. Bruno ("Bruno") present questions of fact. Because any deficiencies in Plaintiff's proof cannot be cured in his reply papers, they argue that any new proof or arguments in the reply should be disregarded. See *Morales v. Coram Materials Corp.,* 51 AD3d 86 (2nd Dept., 2008); *Warrington v. Ryder Truck Rental, Inc.,* 35 AD3d 455 (2nd Dept., 2006); *Rengifo v. City of New York,* 7 AD3d 773 (2nd Dept., 2004); *Salmon v. Wendell Terrace Owners Corp.,* 5 AD3d 372 (2nd Dept., 2004); *Guanopatin v. Flushing Acquisition Holdings, LLC,* 127 AD3d 812 (2nd Dept., 2015); *Roldan v. New York University,* 81 AD3d 625 (2nd Dept., 2011); *Allstate Ins. Co., v. Persampire,* 45 AD3d 706 (2nd Dept., 2007); *Rupp v. City of Port Jervis,* 10 AD3d 391 (2nd Dept., 2004); *Flowers v. Harborcenter Development, LLC,* 155 AD3d 1633 (4th Dept., 2017); *Diaz v. Tumbiolo,* 111 AD3d 877 (2nd Dept., 2013); *Ulster County v. CSI, Inc.,* 95 AD3d 1634 (3rd Dept., 2012); *Stock v. Otis Elevator Co.,* 52 AD3d 816 (2nd Dept., 2008); *Madalinski v. Structure-Tone, Inc.,* 47 AD3d 687 (2nd Dept., 2008); *Taylor v. One Bryant Partk, LLC,* 94 AD3d 415 (1st Dept., 2012); *Taylor v. New York City Transit Authority,* 130 AD3d 712 (2nd Dept., 2015); *Diaz v. Tumbiolo,* 111 AD3d 877 (2nd Dept., 2013); *Santos v. ACA Waste Services, Inc.,* 103 AD3d 788 (2nd Dept., 2013); *Town of Fishkill v. Timothy J. Turner,* 60 AD3d 932 (2nd Dept., 2009); *Kramer v. Oil Services, Inc.,* 56 AD3d 730 (2nd Dept., 2008); *Pastoriza v. State,* 108 AD2d 605 (1st Dept., 1985); *Curtis v. Wilhouski,* 93 AD3d 816 (2nd Dept., 2012); *Wilinski v. 334 East 92nd Housing Development Fund Corp.,* 18 NY3d 1 (2011); *Rodriguez v. DRLD Development Corp.,* 109 AD3d 409 (1st Dept., 2013); *Rosado v. Briarwoods Farm, Inc.,* 19 AD3d 396 (2nd Dept., 2005); *Romero v. 2200 Northern Street, LLC,* 148 AD3d 1066 (2nd Dept., 2017); *Salazar v. Novalex Contracting Corp.,* 18 NY3d 134 (2011); *Narducci v. Manhasset Bay Assoc.,* 96 NY2d 259, 727 NYS2d 37, 750 NE2d 1085; *Maldonado v. AMMM Properties Co.,* 107 AD3d 954 (2nd Dept., 2013); *Mendez v. Jackson Development Group, Ltd.,* 99 AD3d 677 (2nd Dept., 2012); *Simmons v. City of New York,* 165 AD3d 725 (2nd Dept., 2018); *Portalatin v. Tully Construction Co.-EE Cruz & Co.,* 155 AD3d 799 (2nd Dept., 2017) [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

In his Reply Affirmation, dated December 17, 2018, Plaintiff reiterates that his injuries are due to Defendants' failure to properly protect him against a falling object pursuant to *Labor Law Section 240(1)* because they did not utilize adequate safety devices. Since further discovery would be fruitless, he repeats that summary judgment is not premature. See *CPLR 4518(a); People v. Foster,* 27 NY2d 47, 313 NYS2d 384 (1970); *People v. Kennedy,* 68 NY2d 569, 510 NYS2d 853 (1986); *Bishin v. New York Cent. R. Co.,* 20 AD2d 921, 249 NYS2d 778 (2nd Dept., 1964); *Toll v. State,* 32 AD2d 47, 299 NYS2d 589 (3rd Dept., 1969); *Narducci v. Manhasset Bay Assoc., supra; Outar v. City of New York,* 5 NY3d 731, 799 NYS2d 770 (2005); *Koenig v. Patrick Constr. Corp.,* 298 NY 313, 83 NE2d 133 (1948); *Seales v. Trident Structural Corp.,* 142 AD3d 1153, 38 NYS3d 49 (2nd Dept., 2016); *Paltrow v. Town of Lewisboro,* 199 AD2d 372 (2nd Dept., 1993); *MRI Broadway Rental, Inc., v. United States Mineral Products Co.,* 242 AD2d 440 (2nd Dept., 1997), aff'd 92 NY2d 421 (1998); *DiSabato v. Soffee,* 9 AD2d 297 (1st Dept., 1959); *Haidhaqi v. Metropolitan Transit Auth.,* 153 AD3d 1328, 62 NYS3d 408 (2nd Dept., 2017); *Reynolds v. Avon Grove Props.,* 129 AD3d 932, 12 NYS3d 199 (2nd Dept., 2015); *Burlington Ins. Co., v. Casur Corp.,* 123 AD3d 965, 1 NYS3d 150 (2nd Dept., 2014); *Ruttura & Sons Constr., v. Petrocelli Constr. Co.,* 257 AD2d 614, 684 NYS2d 286 (2nd Dept., 1999); *Norero v. 99-105 Third Ave. Realty LLC,* 96 AD3d 727, 945 NYS2d 720 (2nd Dept., 2012); *Friedman v. Ocean Dreams, LLC,* 56 AD3d 719, 868 NYS2d 131 (2nd Dept., 2008); *Marchese v. Skenderi ,* 51 AD3d 642, 856 NYS2d 680 (2nd Dept., 2008); *Zhu v. Triple L Group, LLC,* 64 AD3d 590, 881 NYS2d 324 (2nd Dept., 2009); *Rivera v. Dafna Construction Co., Ltd.,* 27 AD3d 545, 813 NYS2d 109

(2nd Dept., 2006); *Pineda v. Kechek Realty Corp.,* 285 AD2d 496, 727 NYS2d 175 (2nd Dept., 2001); *Rosario v. Sebcom I. Associates, LP,* 305 AD2d 307, 761 NYS2d 607 (1st Dept., 2003); *Garcia v. Lenox Hill Florist III, Inc.,* 120 AD3d 1296 (2nd Dept., 2014); *Medina v. Rodriguez,* 92 AD3d 850, 939 NYS2d 514 (2nd Dept., 2012); *Hanover Ins. Co., v. Prakin,* 81 AD3d 778, 916 NYS2d 615 (2nd Dept., 2011); *Essex Ins. Co., v. Michael Cunningham Carpentry,* 74 AD3d 733, 904 NYS2d 78 (2nd Dept., 2010); *Peerless Ins. Co., v. Micro Fibertek, Inc.,* 67 AD3d 978, 890 NYS2d 560 (2nd Dept., 2009); *Gross v. Marc,* 2 AD3d 681, 768 NYS2d 627 (2nd Dept., 2003) [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Plaintiff vehemently challenges Defendants' denial of ownership of the property in question. He submits a public document search from New York City Property Statements List of New York City Buildings which reveals the property as owned by the New York City Department of Education. See *Rotuba Extruders v. Ceppos,* 46 NY2d 223, 413 NYS2d 141 (1978); *Mallad Constr. Corp., v. County Fed Sav. & Loan Ass'n,* 32 NY2d 285, 344 NYS2d 925 (1973); *V. Savino Oil and Heating Co., Inc., v. Rana Management Corp.,* 161 AD2d 635, 555 NYS2d 413 (2nd Dept., 1982) [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

COURT RULINGS

This Court denies Plaintiff Luis O. Jara's motion pursuant to *CPLR 3212* for partial summary judgment on liability against Defendants City of New York, New York City Department of Education and New York City School Construction Authority pursuant to *Labor Law Section 240(1)* because it is premature [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

In order to establish entitlement to summary judgment on a *Labor Law Section 240(1)* claim involving a falling object, a plaintiff shoulders the burden of showing that more than an object fell. A plaintiff must demonstrate that the object fell because of the absence or inadequacy of a safety device of the kind enumerated in the statute. See *Seales v. Trident Structural Corp.,* 142 AD3d 1153 (2nd Dept., 2016); *Fabrizi v. 1095 Avenue of Americas, LLC,* 22 NY3d 658 (2014); *Moncayo v. Curtis Partition Corp.,* 106 AD3d 963 (2nd Dept., 2013); *Rosado v. Briarwoods Farm, Inc., supra; Romero v. 2200 Northern Steel, LLC, supra; Narducci v. Manhasset Bay Associates, supra; Maldonado v. AMMM Properties Company, supra; Mendez v. Jackson Development Group, Ltd., supra; Simmons v. City of New York, supra; Portalatin v. Tully Construction Co. – EE Cruz & Company, supra* [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

However, as proof for his liability claim pursuant to *Labor Law Section 240(1),* Plaintiff only submits: 1) the unsworn statements of Mr. Tapia, Mr. Nieto, Mr. Arcuri, Mr. Bowan and Mr. Naula[2]; 2) the uncertified Terrier Claims Services Report, dated January 11, 2017; 3) Plaintiff's uncertified HIPPA Release Form, dated December

[2] This Court observes that the handwriting in the statements by Messrs. Tapia, Nieto, Arcuri, Bowan and Naula appear identical. Only their signatures differ [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

28, 2016 as well as Plaintiff's unsworn statement[3]; 4) the unsworn Employer's Report of Work-Related Injury/Illness, dated December 27, 2016; and 5) New York State Workers Compensation Board Employee Claim, dated January 3, 2017. Since none of these documents are sworn and/or certified, this Court cannot use them in its determination. See *Warrington v. Ryder Truck Rental, Inc., supra; Salmon v. Wendell Terrace Owners Corp., supra; Guanopatin v. Flushing Acquisition Holdings, LLC, supra; Roldan v. New York University, supra; Allstate Insurance Company v. Persampire, supra; Rupp v. City of Port Jervis, supra; Flowers v. Harborcenter Development, LLC, supra; Diaz v. Tumbiolo, supra; Ulster County v. CSI, Inc., supra; Stock v. Otis Elevator Company, supra; Madalinski v. Structure-Tone, Inc., supra; Taylor v. One Bryant Park, LLC, supra; Taylor v. New York City Transit Authority, supra; Santos v. ACA Waste Services, Inc., supra; Kramer v. Oil Services, Inc., supra; Carrie v. Wilhouski, supra* [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Because Plaintiff has not provided sufficient proof, this Court notes the Second Department's clear rulings about a reasonable opportunity for a party to conduct discovery prior to the determination of a motion for summary judgment pursuant to *CPLR Section 3212.* See *Hawana v. Carbuccia, supra; Ingram v. Bay Ridge Automotive Management Corp., supra; Brea v. Salvatore, supra; Chandler v. Eagle Sanitation, Inc., supra; Ryo v. Minerva, supra; In the Matter of Fasciglione, supra; Somereve v. Plaza Construction Corp., supra; Antonyshyn v. Tishman Construction Corporation, supra; Churaman v. C&B Electric Plumbing & Heating, Inc., supra; Schlicting v. Elliquence Realty, LLC, supra; Harvey v. Nealis, supra; Afzal v. Board of Fire Commissioners of Bellmore Fire District, supra; Heath v. County of Orange, supra; Hoxha v. City of New York, supra; Rengifo v. City of New York, supra* [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Therefore, due to the insufficient evidence in this case about how the accident occurred, Plaintiff's motion is premature. Only Plaintiff has testified at a *50-h* hearing. The depositions of five (5) non-party witnesses from Cinalta Construction Corp., Jesus Tapia, Joseph Nieto, Frank Arcuri, Roger Bowan and Luis Paucay Naula have not yet occurred. In particular, Mr. Nieto and Mr. Tapia were eyewitnesses to the accident. Mr. Bowan was Cinalta Project Labor Foreman. Mr. Arcuri was Cinalta Project Supervisor. Mr. Naula was Cinalta's Local 79 Labor Shop Steward. Thus, those depositions would be of assistance in determining this motion for summary judgment because there are questions of fact about: 1) how or why the brick fell; 2) whether the object fell while being hoisted or secured; 3) whether it required securing and 4) whether there was an absence or inadequacy of a safety device of the kind enumerated in *Labor Law Section 240(1).* See *Hawana v. Carbuccia, supra; Ingram v. Bay Ridge Automotive Management Corp., supra; Brea v. Salvatore, supra; Chandler v. Eagle Sanitation, Inc., supra; Ryo v. Minerva, supra; In the Matter of Fasciglione, supra; Somereve v. Plaza Construction Corp., supra; Antonyshyn v. Tishman Construction Corporation, supra; Churaman v. C&B Electric Plumbing & Heating, Inc., supra; Schlicting v. Elliquence Realty, LLC., supra; Harvey v. Nealis, supra; Afzal v. Board of Fire Commissioners of Bellmore Fire District, supra; Heath v. County of Orange, supra; Hoxha v. City of New York, supra; Rengifo v. City of New York, supra; Podobedov v. East Coast Construction Group, Inc., supra; Wysk v. New York City School Construction Authority, supra; Pazmino v. 41-50 78th Street Corp., supra; Gonzalez v. TJM Construction Corp., supra; Harinarain v. Walker, supra; Roberts v. General Electric Co., supra; Narducci v. Manhasset Bay Assoc., supra; Donnelly v. City of Niagara Falls, supra; Fried v. Always Green, supra; Galvin v. Triborough Bridge and Tunnel Authority, supra; Rosado v. Briarwoods Farm, Inc., supra; Wilinski v. 334 East 92nd Housing Development*

[3] This Court observes that the handwriting in the statement by Plaintiff Jara appears identical to the handwriting in the statements by Messrs. Tapia, Nieto, Arcuri, Bowen and Naula. Only Plaintiff's signature differs [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Fund Corp., supra; Rodriguez v. DRLD Development Corp., supra; Carlton v. City of New York, supra; *Garbett v. Wappingers Central School District, supra* [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

This Court finds unavailing Defendants City, NYCDOE and NYCSCA's argument that they are not defendants pursuant to *Labor Law Section 240(1).* It notes that the BID and Contract Agreement for Exterior Masonry/ Flood Elimination/ Windows/Parapets/ Roofs [sic] for PS 77/IS 266 (Brooklyn) for Contract # 000013946 for Solicitation #SCA15-14166D-1 for $33,792,000.00 (Thirty-Three Million Seven Hundred Ninety-Two Thousand Dollars) is between the New York City School Construction Authority and Cinalta Construction Corp. The contract was awarded on July 6, 2015. It bears the signature of the New York City Schools Construction Authority President and CEO Lorraine Grillo. See *Labor Law Section 240(1); Rotuba Extruders v. Ceppos, supra; Mallad Constr. Corp., v. County Fed Sav. & Loan, Ass'n, supra; V. Savino Oil and Heating Col, Inc., v. Rana Management Corp., supra* [Plaintiff 1, Exhs. A-P; Plaintiff 2 Memorandum of Law; Defendants Opposition 3, Exhs. A-D; Plaintiff Reply Affirmation 4, Exhs. A-B].

Based on the foregoing, it is hereby ORDERED as follows:

Plaintiff Luis O. Jara's motion pursuant to *CPLR 3212* for partial summary judgment on liability against Defendants City of New York, New York City Department of Education and New York City School Construction Authority pursuant to *Labor Law Section 240(1)* is DENIED.

This constitutes the Decision and Order of the Court.

Date: May 29, 2019
Jara v. City of New York et al,
(#520546/2017)

Dawn Jimenez-Salta, J.S.C.

2019 JUN 14 AM 9:14
KINGS COUNTY CLERK
FILED

Hon. Dawn Jimenez-Salta