SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 97
Justice

ELIA CABRERA,

Plaintiff,

INDEX NO. 501944/2015
SEQ. NO. 5, 6

- against -

SILVERSTEIN PROPERTIES, INC., 4 WORLD TRADE CENTER LLC, TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and TISHMAN REALTY & CONSTRUCTION CO., INC.,

Defendants.

In accordance with CPLR 2219(a), the following papers were read on this motion:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3
Transcript of Oral Argument	4

Motions sequence numbers 5 and 6 are consolidated for disposition.

This is a personal injury action commenced by plaintiff Elia Cabrera (plaintiff) against defendants Silverstein Properties, Inc. (Silverstein), 4 World Trade Center LLC (4 WTC LLC), Tishman Construction Corporation (Tishman), Tishman Construction Corporation of New York and Tishman Realty & Construction Co., Inc. (collectively, defendants) to recover for injuries allegedly sustained while performing construction work on February 22, 2012. Specifically, in

his Complaint, plaintiff alleges causes of action premised on common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Issue has been joined and the Note of Issue was filed.

Before the Court is a motion by plaintiff for an Order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability on his Labor Law § 240(1) cause of action as against defendants 4 WTC LLC and Tishman (motion sequence 5). Defendants cross-move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the Complaint (motion sequence 6).

BACKGROUND

Plaintiff alleges that he suffered injuries on February 22, 2012 while working as a form stripper at a job site located at 4 World Trade Center when a four by four (also referred to as a stringer or a rib) he was removing from the ceiling fell or slid down the jack and struck plaintiff in the left rib cage. 4 WTC LLC was the ground lessee of the 4 World Trade Center site and, pursuant to a contract dated February 7, 2008, 4 WTC LLC hired Tishman to act as the general contractor for the construction of a sixty-four (64) story commercial office tower at the 4 World Trade Center site. Tishman, in turn, hired Roger and Sons Concrete, Inc. (Roger and Sons) to perform concrete work on the project, which work included pouring the concrete for the building's floors and walls. Plaintiff was employed by Roger and Sons as a form stripper, and his duties included taking the forms off of the ceiling and walls after the concrete poured by Roger and Sons had dried.

According to plaintiff's deposition testimony, in the morning of February 22, 2012, plaintiff's supervisor directed him to take down four by fours from the ceiling of an area located on the 46th floor of the building.[1] The four by fours were approximately 60-to-70- pound, 20-

1. Although some of plaintiff's testimony, which was through a translator, refers to taking down the four by fours from a wall, other testimony makes clear that the four by fours at issue were located on the ceiling near a wall on the 46th floor.

foot-long wood pieces that served as supports for the plywood forms. Each four by four was supported by five jacks that stood on the floor, and the carpenters who set up the forms, would attach the top of each jack to a four by four with two nails. Plaintiff, in order to remove a four by four, would unlock a jack one at a time, lower it approximately one foot, then tilt the five jacks and four by four over in order to lean the five jacks and four by four against something such as a wall, and then proceed to pry out the nails attaching the four by four to the jacks with a hammer.

The accident at issue occurred as plaintiff, who was working on his own, was removing the last of approximately twenty four by fours. Plaintiff was able to unlock and lower four of the five jacks supporting this last four by four, but when he started to lower the fifth jack, the four by four detached from the jacks, fell or slid down the jack, and struck him in the rib cage. Plaintiff testified that he is five-feet, nine-inches tall, and that the four by four that fell and struck him was 13 feet above his head when it began to fall or slide.[2]

In his deposition testimony, Carl Curatola (Curatola), a Tishman site-safety manager, agreed that insuring that the four by fours are nailed onto the jacks so that when they are being removed the worker could bring it down through a controlled tilting of the jacks would present the safest means of removing the four by fours. Curatola, however, also testified that, in his years of experience, not every four by four ends up being nailed to the jack, or even if they are nailed in, the nails come loose. Because of this, Curatola found it common for four by fours to fall while workers were stripping the floors.

SUMMARY JUDGMENT STANDARD

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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY*

2. Of note, Tishman's witness testified that, at the time of the accident, there would have been approximately 20 feet from the floor to the top of a jack.

Univ. Medical Cntr., 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [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 (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

Plaintiff filed a Note of Issue in this action on April 30, 2018. Accordingly, plaintiff's motion, made on June 28, 2018, is timely. Defendants, however, did not make their cross-motion until September 12, 2018, almost six months after the filing of the Note of Issue herein.

Accordingly, defendants' cross-motion is untimely pursuant to Kings County Supreme Court Uniform Civil Term Rules Part C, Rule 6, as well as this Court's Part 97 Rules, since it was made more than 60 days after the filing of the Note of Issue (*see Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]; CPLR 3212[a]).

However, since plaintiff has already timely moved for partial summary judgment with respect to liability on his Labor Law § 240(1), this Court may properly consider the portion of defendants' cross-motion seeking dismissal of the Labor Law § 240 (1) cause of action (*see Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2d Dept 2014]; *Wernicki v Knippert*, 119 AD3d 775, 776 [2d Dept 2014]; *Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013]). On the other hand, plaintiff's motion does not provide a basis to consider defendants' arguments with respect to the dismissal of plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims as those claims are not addressed in plaintiff's motion (*see Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691-692 [1st Dept 2018]; *Sheng Hai Tong*, 144 AD3d at 890; *Paredes*, 110 AD3d at 702). Since defendants have also failed to make any factual or legal arguments suggesting that they have good cause for their delay in moving, the portions of defendants' cross-motion addressing plaintiff's common-law negligence and Labor Law §§ 200 and 241(6) claims are denied as untimely (*see Sheng Hai Tong*, 144 AD3d at 870; *Goldin*, 112 AD3d at 579). Accordingly, the only issues to be addressed on the merits relate to plaintiff's Labor Law § 240(1) cause of action.

Labor Law § 240 (1) imposes absolute liability on owners and contractors or their agents when their failure to protect workers employed on a construction site from the risks associated with falling objects proximately causes injury to a worker (*see Wilinski v 334 East 92nd Housing Dev. Fund Corp.*, 18 NY3d 1, 3 [2011]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267-

268 [2001]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]).3 For a defendant to be held liable under Labor Law § 240(1), a plaintiff's injuries must be "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *Wilinski*, 18 NY3d at 10).

With respect to accidents involving falling objects, the "plaintiff must show more than simply that an object fell causing injury to a worker" (*Narducci*, 96 NY2d at 268; *see also Fabrizzi v 1095 Ave. of Ams., L.C.C.*, 22 NY3d 658, 663 [2014]). A plaintiff must show that, at the time the object fell, it was "being hoisted or secured" (*Narducci*, 96 NY2d at 268) or "required securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758 [2008]) and that the object fell "because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*Narducci*, 96 NY2d at 268; *see Fabrizzi*, 22 NY3d at 663). "While a plaintiff is not required to present evidence as to which particular safety devices would have prevented the injury, the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016]; *see Carlton v City of New York*, 161 AD3d 930, 932 [2d Dept 2018]; *cf. Fabrizi*, 22 NY3d at 663).

In applying these legal principles, the Court finds that plaintiff has established his prima facie entitlement to judgment as a matter of law with respect to his Labor Law § 240(1) cause of action. Initially, plaintiff's testimony that the four by four was located approximately 13 feet

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3. As is relevant here, Labor Law § 240 (1) provides that,

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

above his head and that it weighed approximately 60 to 70 pounds shows that plaintiff was subject to a "physically significant elevation differential" between him and the four by four that fell (*see Wilinski*, 18 NY3d at 10; *Tropea v Tishman Constr. Corp.*, 172 AD3d 450, 451 [1st Dept 2019], *affirming* 2017 WL 6731869, *2 [U] [Sup Ct, New York County 2017]; *Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017]; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730, 730-731 [2d Dept 2011]; *Mendoza v Bayridge Parkway Assoc., LLC*, 38 AD3d 505, 506 [2d Dept 2007]).

The testimony of plaintiff and that of Curatola, Tishman's site-safety manager, also demonstrates the need for a section 240(1) device in view of the obvious risks inherent in plaintiff's work presented by removing the four by fours and the other form components involved here (*see Passos v Noble Constr. Group, LLC*, 169 AD3d 706, 707-708 [2d Dept 2019]; *Gikas v 42-51 Hunter St., LLC*, 134 AD3d 987, 988 [2d Dept 2015]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012]; *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 1127 [2d Dept 2010]; *Lucas v Fulton Realty Partners, LLC*, 60 AD3d 1004, 1006 [2d Dept 2009]; *cf. Narducci*, 96 NY2d at 268-269; *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090, 195-1096 [2d Dept 2012]). Their testimony distinguishes the circumstances of plaintiff's accident from factual situations where courts have found that Labor Law § 240(1) devices are less likely to be required, such as when the falling object has been deliberately dropped (*see Roberts v General Elec. Co.*, 97 NY2d 737, 738 [2002]), or the object was part of the building's permanent structure (*see Narducci*, 96 NY3d at 268; *Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825 [2d Dept 2009]).

Plaintiff's testimony, and that of Curatola, also demonstrates that the nails used to attach the four by four to the jacks were intended, at least in part, to hold the four by four onto the jacks during the set-up and removal of the forms. As such, the nails served as a Labor Law § 240(1) securing device (*see Keerdoja v Legacy Yards Tenant, LLC*, 166 AD3d 418, 418-419

[1st Dept 2018]; *cf. Fabrizi*, 22 NY3d at 663), and the nails' failure to support the four by four on the jacks demonstrates their inadequacy (*Keerdoja*, 166 AD3d at 419; *Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089, 1092 [2d Dept 2015]; *Gabrus v New York City Hous. Auth.*, 105 AD3d 699, 699-700 [2d Dept 2013]; *La Veglia*, 78 AD3d at 1127). Even if the nails cannot be considered a Labor Law § 240(1) safety device (*see Carlton*, 161 AD3d at 933; *see also Fabrizi*, 22 NY3d at 663), the record also supports a finding that the accident was caused by the failure to employ hoists, slings, stays, ropes or other such section 240(1) devices during the removal process (*see Barrios v 19-19 24th Ave. Co., LLC*, 169 AD3d 747, 748-749 [2d Dept 2019]; *Passos*, 169 AD3d at 707-708; *Rutkowski*, 146 AD3d at 686; *Gikas*, 134 AD3d at 988; *Pritchard*, 82 AD3d at 730-731; *La Veglia*, 78 AD3d at 1127; *Lucas*, 60 AD3d at 1006).

Contrary to defendants' contentions, the deposition testimony of plaintiff and Curatola is sufficient to make out plaintiff's prima showing without the need for an affidavit from an expert (*see McCallister*, 92 AD3d at 928-929; *see also Passos*, 169 AD3d at 707-709). Further, the fact that plaintiff may have been the sole witness to his accident does not preclude an award of summary judgment in his favor (*see e.g. Klein v City of New York*, 89 NY2d 833, 834-835 [1996]; *Cardenas v 111-127 Cabrini Apts. Corp.*, 145 AD3d 955, 957 [2d Dept 2016]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011]). Defendants have offered no evidence, other than mere speculation, to undermine the plaintiff's showing of entitlement to judgment as a matter of law, or present a bona fide issue regarding the plaintiff's credibility as to a material fact (*see Cardenas*, 145 AD3d at 957; *Melchor*, 90 AD3d at 869; *see also Klein*, 89 NY2d at 835).[4] Nor have they submitted any evidence to suggest that the use of a Labor Law § 240 device to secure the four by fours would have been contrary to the objectives of the work (*see Ross v DD*

4. The defendants did not specifically argue that plaintiff's actions were the sole proximate cause of his accident or that he was a recalcitrant worker. In any event, there is no evidence in the record suggesting that plaintiff failed to use readily available safety devices that he knew about (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]) or that plaintiff refused to follow specific safety instructions (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]; *Garzon v Viola*, 124 AD3d 715, 716-717 [2d Dept 2015]), the respective prerequisites for demonstrating that plaintiff was the sole proximate cause of the accident and that he was recalcitrant.

11th Ave., LLC, 109 AD3d 604, 605 [2d Dept 2013]; *cf. Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]). Defendants have failed to submit evidentiary proof demonstrating the existence of a factual issue warranting denial of plaintiff's motion, and have also failed to demonstrate their own prima facie entitlement to summary judgment dismissing the Labor Law § 240(1) cause of action.

CONCLUSION

Based upon the foregoing, it is hereby,

ORDERED that plaintiff's motion for an Order, pursuant to CPLR 3212, granting him partial summary judgment with respect to liability on his Labor Law § 240(1) cause of action against defendants 4 World Trade Center LLC and Tishman Construction Corporation is granted (motion sequence 5); and it is further,

ORDERED that defendants' cross-motion for an Order, pursuant to CPLR 3212, granting them summary judgment dismissing the Complaint is denied in its entirety (motion sequence 6); and it is further,

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 10/3/19

PAUL WOOTEN J.S.C.

KINGS COUNTY CLERK
FILED
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