To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

ROGER MEJIA,

Plaintiff,

Index No. 63575/2017

– against –

69 MAMARONECK ROAD CORP. AND JBD DEVELOPMENT CORP.,

Defendants.

DECISION & ORDER

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69 MAMARONECK ROAD CORP. AND JBD DEVELOPMENT CORP.,

Third-Party Plaintiffs,

– against –

DALOMBA MASONRY LLC., WR HOME BUILDERS, LLC., AND WESTCHESTER PAVERS, LLC,

Third-Party Defendants.

In an action to recover damages for personal injuries, the plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law 240(1) and 241(6) based upon Industrial Code Regulations 12 NYCRR 23-1.7 and 23-3.3:

Papers Considered

1. Notice of Motion/Affirmation of Howard B. Altman, Esq./Exhibits 1-7;
2. Affirmation of Sande E. Lichtenstein, Esq.;
3. Reply Affirmation of Howard B. Altman, Esq.

Factual and Procedural Background

Plaintiff was injured on October 5, 2016, while working at a construction site in Scarsdale. The defendant 69 Mamaroneck Road Corp. was the owner of the site. The defendant JBD Development Corp. retained several subcontractors to perform work at the site.

Plaintiff, a roofer, was injured when he fell through an open hole cut out for the installation of the chimney. On the date of the accident, plaintiff was wearing a safety

harness while working on one side of the roof. His brother, who was also a roofer, called him over for assistance with the work he was doing in another area of the roof that was flat. Plaintiff unhooked his harness because the rope was not long enough to reach the other side of the roof. As he walked across the flat roof, he fell through an unprotected hole.

Jordan Dubbs testified that he is the sole shareholder of 69 Mamaroneck and JBD. 69 Mamaroneck owned the premises while JBD retained WR Homebuilders to perform the framing work and Matthew Roofing Company to perform the roofing work on the project. Dubbs testified that he was a real estate developer in the business of constructing homes for sale. The project consisted of the construction of a 7,000 square foot home which was eventually sold. He was not present at the time of plaintiff's accident.

Plaintiff commenced this action against the defendants asserting causes of action for violations of Labor Law 200, 240(1)(2)(3), and 241(6) as well as common law negligence. In support of the 241(6) cause of action plaintiff alleged violations of numerous Industrial Code Regulations. 69 Mamaroneck and JBD commenced a third party action against Dalomba Masonry LLC, WR Home Builders, LLC, and Westchester Pavers, LLC.

Discussion

Plaintiff moves for partial summary judgment on the issue of liability pursuant to Labor Law 240(1) and 241(6) premised upon violations of 12 NYCRR 23-1.7(b) and 12 NYCRR 23-3.3.

In opposition, defendants argue that issues of fact exist as to whether plaintiff's actions, in unhooking his safety harness, was the sole proximate cause of his injuries.

Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Esteves-Rivas v W2001Z/15CPW Realty, LLC*, 104 AD3d 802, 803 [2d Dept 2013]).

"[W]here an accident is caused by a violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). However, where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d at 39; *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 [2003]). "To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (*Allan v DHL Express [USA], Inc.*, 99 AD3d 828, 833 [2d Dept 2012]; *see Alvarez v Vingsan L.P.*, 150 AD3d 1177 [2d Dept 2017]; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476 [2d Dept 2012]).

Plaintiff failed to demonstrate entitlement to partial summary judgment on the issue of liability pursuant to Labor Law 240(1). The evidence demonstrates that plaintiff was provided with a safety harness, was instructed by his employer how to use the safety harness, and was instructed to wear the safety harness at all times while working on the roof.

Plaintiff testified that he had been a roofer for over ten years. On the job in question, he was provided with a safety harness and rope that was over ten feet long. Plaintiff testified that the rope was attached to an anchor. Plaintiff testified that the anchors were moved depending on where the work was being performed on the roof. He admitted that he placed anchors many times. In fact, on this particular job, plaintiff installed some of the anchors on the roof while his coworkers installed the remaining anchors.

Plaintiff testified that his brother, who was a coworker, was working between 10 and 20 feet away. In order to get to the area where his brother was working, plaintiff traversed a flat portion of the roof. According to plaintiff, the flat roof was covered with an ice and water shield. Plaintiff unhooked his rope from the anchor in order to reach the area where his brother was working. As he walked across the flat roof, he fell through a hole.

Plaintiff also testified that he "was in charge of the job", that he directed his coworkers, and that part of his responsibilities was to connect the anchors (EBT tr. 37-38). Plaintiff further testified that he knew there was a hole in the flat portion of the roof for the chimney, but he didn't know exactly where it was located. He stated that one of his coworkers informed him about the hole prior to his accident. According to plaintiff, the hole was not marked. Plaintiff also admitted that he could have moved the anchor and reattached his safety harness which he conceded would have been the best safety practice (EBT tr. 60-61).

A jury could find that the plaintiff was provided with an adequate safety device, that he was expected to use the safety device, and that he chose for no good reason not to do so, and had he not made that choice, he would not have been injured (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]; *see Jones v City of New York*, 166 AD3d 739 [2d Dept 2018]). There is no evidence that the plaintiff was required to work in the area where the hole was located. Moreover, plaintiff was aware that there was a hole in the flat portion of the roof and unhooked his safety harness despite his experience and the instruction to be tied off at all times while on the roof.

In order to sustain a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]). Plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*see Grabowski v Board of Mgrs. of Avonova Condominium*, 147 AD3d 913 [2d Dept 2017]). To establish liability under

Labor Law § 241 (6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case (*see Aragona v State of New York*, 147 AD3d 808, 809 [2d Dept 2017]).

12 NYCRR 23-1.7(b)(1) applies to hazardous openings, and provides, in pertinent part:

> (i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

Plaintiff established a prima facie violation of 1.7 by demonstrating a violation of an applicable Industrial Code Regulation which is sufficiently specific. Any comparative negligence on the part of the plaintiff does not preclude liability founded upon a violation of Labor Law § 241(6) (*see Rodriguez v City of New York,* 31 NY3d 312 [2018]; *Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 719 [2d Dept 2019]; *Cutaia v Board of Mgrs. Of the Varick St. Condominium*, __ AD3d __, 2019 NY App Div LEXIS 3445, *4 [1st Dept May 2, 2019] [holding that plaintiff was entitled to partial summary judgment on the 241(6) claim; "[w]hether plaintiff was at all at fault for the accident must await the trial on damages"]; *Quizhpi v South Queens Boys & Girls Club, Inc.*, 166 AD3d 683 [2d Dept 2018]; *Quinn v Whitehall Props., II, LLC*, 69 AD3d 599, 601 [2d Dept 2010]; *Owen v Schulmann Constr. Corp.*, 26 AD3d 362, 363 [2d Dept 2006]).

Section 23-3.3 applies to demolition by hand. Plaintiff failed to demonstrate that he was performing demolition work at the time of the accident. Therefore, plaintiff failed to demonstrate prima facie entitlement to summary judgment on the Labor Law 241(6) cause of action insofar as it is based upon a violation of 12 NYCRR 23-3.3.

Accordingly, the branch of the plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law 241(6) based upon Industrial Code Regulation 12 NYCRR 23-1.7 is GRANTED; and the branches of the plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law 240(1) and Labor Law 241(6) based upon Industrial Code Regulation 12 NYCRR 23-3.3 is DENIED.

Counsel for all parties are directed to appear in the Settlement Conference Part, room 1600, on **August 27, 2019, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
July 11, 2019

HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST – WESTCHESTER/Mejia v. 60 Mamaroneck Road Corp.