SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ **PART** IAS MOTION 47EFM

Justice

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KESI LIN,

Plaintiff,

- v -

207 NORTH 6TH INC.,ICROWN CONSTRUCTION CO INC.,TRI-STATE CONTRACTING OF NY INC.

Defendant.

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INDEX NO. 152157/2016

MOTION DATE 09/26/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 52, 54, 55, 56, 57, 58, 59, 60

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

This is an action to recover damages for personal injuries allegedly sustained by a laborer on October 15, 2015, when, while demolishing a ceiling at a construction site located at 207 North 6th Street, Brooklyn, New York (the Premises), the ladder that he was standing on shifted, causing him to fall.

In motion sequence number 003, plaintiff Kesi Lin moves, pursuant to CPLR 3212, for summary judgment in his favor on the Labor Law § 240 (1) claim against defendant 207 North 6th Inc., the owner of the Premises.[1]

BACKGROUND SUMMARY

On the day of the accident, defendant owned the Premises where the accident occurred. On that day, a gut renovation was taking place at the Premises, a four-story walk-up building

[1]By Order dated September 22, 2016, this court granted a default judgment against the remaining defendants, who never answered the complaint.

with eight residential units (the Project). Plaintiff was hired as a laborer to perform demolition work on the Project, which required him to assist his coworkers in removing the building's ceiling. Plaintiff was employed by nonparty Xiau (or Shen) Yang. Yang was also plaintiff's foreman on the job.

Plaintiff's Deposition Testimony

Plaintiff testified that his accident occurred on his third day on the Project (plaintiff's tr at 15). That day, he and his coworkers were "taking down sheetrock inside of the house" and "removing demolished ceilings" on the second floor (*id.* at 15, 19, 22). Plaintiff was referred to the job by a friend of his, who was also working on the Project (*id.* at 16). Plaintiff could not state the company that he worked for, though he did note that the company had a foreman who supervised his work (*id.* at 17-18, 19).

Plaintiff testified that the drop ceiling in the apartment unit that he was working in at the time of the accident was "[a]t least ten feet [high]" (*id.* at 28). He described the ceiling as "made out of . . . very, very thin metal" (*id.* at 29). In order to take down the ceiling, plaintiff utilized a an aluminum six-foot-tall A-frame ladder, a cordless power drill and a special tool to pry out screws (*id.* at 29-33). He asserted that there were two or three other A-frame ladders in use by other workers at the site, as well (*id.* at 33-35). Plaintiff could not state whether he had ever used the subject ladder before, and he did not know who supplied the ladder or placed it (*id.* at 36, 41, 48).

Plaintiff further testified that just prior to the accident, he was standing on the ladder and "trying to untie the wire, the metal wire" that hung from the ceiling (*id.* at 37). While he sometimes used a tool to perform this work, this time, it was necessary for him to use both of his

hands (*id.* at 37-38, 40). Plaintiff testified, "When I tried to untie the wires somehow . . . the ladder moved and I fell from the ladder" (*id.* at 39). Plaintiff further explained that as he was standing on "[t]he second step from the top" of the ladder and facing the wires that he was untying, "the ladder tipped" (*id.* at 39, 41).

Plaintiff could he recall whether he felt the ladder shake or wobble at any time before his accident (*id.* at 44). He also could not recall whether the ladder remained upright after the accident, or what caused the ladder to move (*id.* at 39, 55). He opined that it was possible that the ladder "sat on something," since there was debris present on the floor (*id.* at 47). When he was asked if he checked the ladder to make sure that it was stable before he went up it, plaintiff replied, "No" (*id.*).

Plaintiff also testified that he never observed any scaffolds at the site, nor were there any harnesses or other such devices available to him that would have allowed him to safely reach the ceiling (*id.* at 50). While plaintiff was aware that two of his coworkers were present in the same room at the time of the accident, he "really didn't know" if they witnessed his accident (*id.* at 46).

Isaac Maman's Deposition Testimony (Defendant's Representative and Owner)

Isaac Maman testified that he owned and managed the Premises, a "4-story, 8-family, all residential, walk-up" on the day of the accident (Maman tr at 11-12). Maman hired multiple contractors for the Project, including Yang, a handyman, who had hired plaintiff (*id.* at 17-18). Maman asserted that Yang supplied the ladders at the site (*id.* at 32). Maman did not recall seeing any scaffolds present at the site (*id.* at 34).

DISCUSSION

"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" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dep't 2011], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*O'Brien v. Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017], citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The Labor Law § 240 (1) Claim (motion sequence number 003)

Plaintiff moves for summary judgment in his favor on his Labor Law § 240 (1) claim against defendant. 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], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "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]).

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]).

Plaintiff has met his prima facie burden of establishing that Labor Law § 240 (1) was violated by putting forth his uncontested testimony that, while he performed his assigned work, which required him to have both hands over his head, the ladder on which he was working shifted, causing him to fall to the ground and become injured. Importantly, "'[w]here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)'" (*Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [where the plaintiff was injured as a result of an unsteady ladder, the plaintiff did not need to show that ladder was defective for the purposes of

liability under Labor Law § 240 (1), only that adequate safety devices to prevent the ladder from slipping or to protect the plaintiff from falling were absent], quoting *Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [the plaintiff "met his prima facie burden through testimony that while he performed his assigned work, the eight-foot ladder on which he was standing shifted, causing him to fall to the ground"]; *Rodriguez v New York City Hous. Auth.*, 194 AD2d 460, 461 [1st Dept 1993] [Labor Law § 240 (1) violated where the ladder the plaintiff fell from "contained no safety devices, was not secured in any way and was not supported by a co-worker"]).

"[A] presumption in favor of plaintiff arises when a scaffold or ladder collapses or malfunctions 'for no apparent reason'" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 381 [1st Dept 2007] [citation omitted], *affd* 11 NY3d 757 [2008]). "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011] [where the plaintiff was injured when the top of the ladder that he was working on slid away from the house, Court held that "[t]he defect in the ladder, and the fact that it was not secured, were substantial factors in causing plaintiff to fall"]).

In opposition to plaintiff's motion, defendant asserts that the mere fact that plaintiff fell from the ladder is insufficient to establish a Labor Law § 240 (1) violation, especially in light of the fact that there is no evidence in the record establishing that the ladder was defective in any way. However, it is not necessary for plaintiff to show that the ladder was defective in order to recover under Labor Law § 240 (1), as "[i]t is sufficient for purposes of liability under section

240 (1) that adequate safety devices to . . . protect plaintiff from falling were absent" (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639, 640 [1st Dept 2014] [Court properly granted partial summary judgment as to liability on the plaintiff's Labor Law § 240 (1) claim "since plaintiffs submitted uncontradicted deposition testimony that the unsecured extended ladder upon which plaintiff was working slipped and fell out from underneath him"]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008] [where plaintiff sustained injuries "when the unsecured ladder he was standing on to drill holes in a ceiling tipped over," the plaintiff was not required to demonstrate, as part of his prima facie showing, that the ladder he was working on at the time of the accident was defective]).

Moreover, under the circumstances of this case, wherein plaintiff's work required him to have both hands over his head in order to perform the task, it was foreseeable that plaintiff might fall from the ladder in the event that it shifted or moved. As such, an additional and/or different safety device, such as a bakers scaffold, a harness and/or a rope to tie off with was required to prevent plaintiff from falling (*see Ortega v City of New York*, 95 AD3d 125, 131 [1st Dept 2012] [where the plaintiff was working on an elevated work platform that "was taller than it was wide and rested upon wooden planks atop an uneven, gravel surface," the Court considered that "[i]t was foreseeable both that the plaintiff could fall off the elevated work platform and that the . . . rack could topple over"]; *Nimirovski v Vornado Realty Trust Co.*, 29 AD3d 762, 762 [2d Dept 2006] [as it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it to shake, additional safety devices were required to satisfy Labor Law § 240 (1)]).

"'[T]he availability of a particular safety device will not shield an owner or general contractor from absolute liability if the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures'" (*Nimirovski*, 29 AD3d at 762, quoting *Conway v New York State Teachers' Retirement Sys.*, 141 AD2d 957, 958-959 [3d Dept 1988]). According to plaintiff's testimony, "there were no [other] readily available safety devices to assist [plaintiff]" in his work (*Gericitano v Brookfield Props. OLP Co. LLC*, 157 AD3d 622, 622 [1st Dept 2018]). Moreover, plaintiff was under no duty to fetch an alternate safety device on his own because "[t]o place that burden on employees would effectively eviscerate the protections that the legislature put in place" (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 47 [1st Dept 2014]).

Defendant also maintains that plaintiff's motion should be denied because plaintiff gave conflicting testimony as to how many ladders were available at the site, whether he had used the subject ladder previously and who placed it at the accident location. However, these minor inconsistencies "[do] not relate to a material issue," and, thus, do not preclude an award of partial summary judgment as to liability in plaintiff's favor (*Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]; *Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]).[2]

Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi*

[2]Defendant also asserts that the non-compliance of certain nonparty witnesses has frustrated his attempts to gain evidence, warranting the denial of plaintiff's motion. However, because defendant has not identified what information other witnesses might provide, or how that information might be relevant to plaintiff's Labor Law § 240 (1) claim, defendant's assertion is unavailing.

v Greens at Half Hollow, LLC, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). "As has been often stated, the purpose of Labor Law § 240 (1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, 'those best suited to bear that responsibility' instead of on the workers, who are not in a position to protect themselves" (*John*, 281 AD2d at 117, quoting *Ross*, 81 NY2d at 500).

Thus, plaintiff is entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against defendant.

The court has considered defendant's remaining arguments and finds them without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Kesi Lin's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in his favor on the Labor Law § 240 (1) claim against defendant 207 North 76th Inc. is granted; and it is further

ORDERED that the remainder of the action shall continue.

1/3/20
DATE

PAUL A. GOETZ, J.S.C.

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