# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ROBERT DAVID KALISH **PART** IAS MOTION 29EFM

*Justice*

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CRISTIAN PORTILLO,

Plaintiff,

- v -

DRMBRE-85 FEE LLC and THE CHARLIE H. GREENTHAL GROUP, INC.,

Defendants.

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**INDEX NO.** 152890/2017

**MOTION DATE** 10/31/2019

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

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

Motion by Plaintiff Cristian Portillo ("Plaintiff") for partial summary judgment, pursuant to CPLR 3212, on the issue of liability under Labor Law § 240 (1) as against Defendants DRMBRE-85 Fee LLC ("DRM") and The Charlie H. Greenthal Group, Inc. ("Greenthal") (collectively, "Defendants") is granted for the reasons stated herein.

## BACKGROUND

In the instant action, Plaintiff alleges that, on October 14, 2016, he was injured while he was performing renovation work inside apartment 34G ("the apartment") of a building located at 185 East 85th Street ("the building"). The building—which has 442 rental apartments—is owned by DRM and managed by Greenthal.

At the time of Plaintiff's accident, Plaintiff was employed by non-party AJ Custom Home Improvement ("AJ Custom"), and Plaintiff was performing work pursuant to the directions of his supervisor Ricky Pulaski ("Ricky"). At that time, AJ Custom had been renovating various apartments in the building for roughly ten years; and on the day of Plaintiff's accident AJ Custom was performing renovation work on three different apartments—on the 5th floor, the 27th floor, and the 34th floor. (Affirm. in Supp., Ex. 5 [Plaintiff EBT] at 35:13-39:19; Ex. 6 [Maras EBT] at 15:20-16:04.)

Plaintiff stated that, on the date of his accident, he arrived at the building at 8 AM, and that he first performed some demolition work and garbage removal on the fifth-floor apartment before heading up to work on apartment 34G around 11 AM. (Id.) Plaintiff stated that, once in the apartment, Ricky informed Plaintiff that he was to remove certain electrical wires from the walls and ceiling of the apartment which he had marked with blue tape. (Id. at 50:12-95:14.)

Plaintiff stated he had never performed such wire removal work before, but that he had seen Ricky remove wires many times. Plaintiff stated that when Ricky removed wires from a ceiling he had used an A-frame ladder or stood on top of a bucket and that this work usually took Ricky roughly fifteen minutes to perform. Plaintiff stated that he first searched for a ladder and found that the only ladder in the apartment was being used by his co-worker Derek, who refused to let him borrow the ladder. Plaintiff further stated that AJ Custom had roughly 3-4 ladders and that—although AJ Custom had a storage space in the basement—he believed they were probably being used in the other apartments being renovated. Plaintiff stated that he did not attempt to retrieve a ladder from one of the other apartments because he "wanted to finish the job." (Id. at 81:19-82:03.)

Recognizing that Derek "still had a lot of work to do," Plaintiff stated that he found a five-gallon bucket that was roughly 18 inches in height, which he placed directly under the ceiling's electrical box in the front hall of the apartment. (Plaintiff EBT at 81:19-83:04.) Plaintiff stated that he was standing on this bucket and pulling wires for roughly two minutes before the bucket slipped, and he fell directly onto the bucket and floor.

Plaintiff stated that at the time he fell, there were two other workers—not employed by AJ Custom—working in the bedroom, in addition to Derek working in the kitchen. Plaintiff stated that none of these workers saw him fall, but they all heard his fall and came to him immediately thereafter. Plaintiff stated that he then called Ricky on his cell phone, informed Ricky about his fall and that he was in too much pain to continue working. Plaintiff stated that he then went to a nearby drugstore where he purchased a sling and then took the train home. (Id. at 50:12-95:14.)

Plaintiff stated that his accident occurred on Friday, October 14, 2016, and that he returned to work the following Monday. (Id. at 22:20-28:22.) Plaintiff further stated that AJ Custom "fired" him roughly two to four weeks after his accident because he was "not able to do [his] work." (Id.) Plaintiff stated that he was unable to do his work because of his injury, and further stated that he eventually received a lump-sum payment of roughly $11,000 in a separate Workers' Compensation litigation. Plaintiff stated he first went to the hospital for his injuries on November 1, 2016. (Id. at 117:16-122:20.) Plaintiff stated that he had gone to the same hospital for injuries relating to him being hit by a car roughly a month before his fall from the bucket. (Id.)

At depositions of Defendants' employees, both employees stated that, generally speaking, they "never" give the building's own ladders to workers from AJ Custom. (Affirm in Supp., Ex. 6 [Maras EBT] at 51:14-53:03; Ex. 8 [Davidson EBT] at 49:23-50:20.)

On the instant motion, Plaintiff moves for summary judgment on the issue of liability, arguing that Defendants are absolutely liable pursuant to Labor Law § 240 (1). In opposition, Defendants argue that Plaintiff's motion should be denied on the grounds that there is no other evidence corroborating Plaintiff's version of how the accident occurred. Defendants admit that, generally speaking, an unwitnessed accident does not create a bar to summary judgment in favor of a Labor Law § 240 (1) plaintiff. However, Defendants argue that Plaintiff's testimony about the effect of his injuries—particularly, the degree to which it has limited his ability to perform

the same work—is contradicted by video surveillance of him performing work after the accident. Defendants argue that this video along with the timing of Plaintiff's firing and his being hit by a car call Plaintiff's credibility into question. As such Defendants, argue, there is a triable issue of fact concerning whether the accident occurred as Plaintiff describes.

In addition, Defendants argue that, even if the accident occurred as Plaintiff describes, summary judgment should be denied on the grounds that there is a triable issue of fact concerning whether Plaintiff's decision to use a bucket—instead of a ladder—was the sole proximate cause of the accident.

**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." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Id.) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff . . . the court on a summary judgment motion must indulge all available inferences . . . ." (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 A.D.2d 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 A.D.2d 114, 118 [1st Dept 2001] [quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]].) "[T]he public policy protecting workers requires that the

statute be liberally construed." (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 8 [1st Dept 2011].)

To prevail on a Labor Law § 240 (1) claim, Plaintiff must show that the statute was violated, and that this violation was a proximate cause of Plaintiff's injuries. (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003.) It is well settled that contributory negligence by a plaintiff "is not a defense to a claim based on Labor Law § 240(1) and that the injured's culpability, if any, does not operate to reduce the owner/contractor's liability for failing to provide adequate safety devices." (*Stolt v Gen. Foods Corp.*, 81 NY2d 918, 920 [1993].) However, where a plaintiff is the sole proximate cause of an injury, liability does not attach under the statute. (*Blake*, 1 NY3d at 290.)

Here, this Court finds that Plaintiff has established, prima facie, that Defendants violated Labor Law § 240 (1) by failing to supply him with appropriate equipment for his task, that this violation proximately caused his injury, and that Defendants have failed to raise material issues of fact requiring denial of Plaintiff's motion.

The Court first finds that Defendants have failed to raise a triable issue of fact concerning the happening of his accident. Instead of proffering any evidence contradicting Plaintiffs' version of the accident, Defendants ask this Court to reject Plaintiff's version by attacking his credibility and suggesting that Plaintiff's injuries may have been caused by a car accident he suffered roughly a month before the subject accident. The Court finds that, at most, these raise issues related to damages but they do not form the basis for a defense on the issue of liability under Labor Law § 240 (1). Although Defendants argue that the accident was unwitnessed, Plaintiff has testified that the other workers in the apartment (including his co-worker Derek) heard him fall and came to him immediately, and that he called his supervisor immediately to report the accident. Furthermore, there is no dispute that Plaintiff's accident was the subject of a Workers' Compensation claim and that Plaintiff testified that he received roughly $11,000 for said claim.

Second, this Court rejects Defendants' argument that there is a basis to find that Plaintiff was the sole proximate cause of his accident in that he decided to use an 18-inch bucket to remove wires from an electrical box on the ceiling. In certain cases, "a party charged under Labor Law section 240(1) with the duty to provide enumerated safety devices will be absolved of liability where a worker attempts to perform a task at elevation without proper protection, if the proper safety device was 'readily available' and it would have been the worker's 'normal and logical response' to get it." (*Rice v W. 37th Group, LLC*, 78 AD3d 492, 495 [1st Dept 2010], citing *Montgomery v Fed. Express Corp.*, 4 NY3d 805, 806 [2005] and *Robinson v E. Med. Ctr., LP*, 6 NY3d 550, 554 [2006].) "However, to defeat the plaintiff's motion for partial summary judgment, the defendants must raise an issue of fact as to whether the plaintiff 'had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured.'" (*Auriemma v Biltmore Theatre*, LLC, 82 AD3d 1, 10 [1st Dept 2011], quoting *Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 40 [2004].) The First Department has further clarified that "that the requirement of a worker's 'normal and logical response' to get a safety device rather than having one furnished or erected for him is limited to

those situations when workers know the exact location of the safety device or devices and where there is a practice of obtaining such devices because it is a simple matter for them to do so." (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 238 [1st Dept 2009].)

In this case, Plaintiff spent time searching the apartment for an A-frame ladder and his co-worker Derek refused to let him use the only ladder in the apartment. Recognizing that Derek "still had a lot of work to do," Plaintiff then decided to use a bucket that he found in the apartment to pull-out the ceiling wires because he had previously witnessed his supervisor Ricky use a bucket to complete the same task. (Plaintiff EBT at 81:19-83:04.) By pointing to Plaintiff's testimony that he believed that two or three other available ladders would probably be in use in one or two of the other apartments, Defendants merely speculate that Plaintiff may have found an available ladder if he spent additional time looking for one—on the 27th and 5th floors—and potentially carrying it back for what Plaintiff stated he expected to be only a fifteen-minute task. (*See* Plaintiff EBT at 64:04-13.)

Such speculation fails to raise a triable issue of fact that: that Plaintiff knew that there were other ladders readily available; that Plaintiff knew he was expected to use a ladder; and that "for no good reason," Plaintiff chose to use a bucket instead. (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011]; *see also Rice v W. 37th Group, LLC*, 78 AD3d 492, 496 [1st Dept 2010] [affirming summary judgment in favor of the plaintiff where the facts presented "st[ood] in stark contrast to *Montgomery* and *Robinson*, where the records were clear that the adequate safety device could be made *available* to the plaintiffs in a relatively short period of time"].) To expect Plaintiff to have done more to find a ladder would cut against the legislative intent of Labor Law § 240 (1) which is "protecting workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident." (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 520 [1985].) This is especially so in the instant case where Plaintiff has put forth unrebutted evidence that he was fired after his injury prevented him from meeting his employer's demands.

As to the extent of Plaintiff's injuries and what if any portion of the injuries claimed herein can be attributed to his prior car accident, those are issues for the damages portion of trial.

## CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Plaintiff Cristian Portillo ("Plaintiff") for partial summary judgment, pursuant to CPLR 3212, on the issue of liability under Labor Law § 240 (1) as against Defendants DRMBRE-85 Fee LLC ("DRM") and The Charlie H. Greenthal Group, Inc. ("Greenthal") (collectively, "Defendants") is granted; and it is further

ORDERED that within twenty (20) days of the filing date of this decision and order, Plaintiff shall serve a copy of decision and order upon Defendants and the Clerk of the Court with notice of entry, and the Clerk of the Court is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

1/02/2020
DATE

ROBERT DAVID KALISH, J.S.C.
HON. ROBERT D. KALISH
J.S.C.

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| 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 |