SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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PUBLIC ADMINISTRATOR OF QUEENS COUNTY AS ADMINISTRATOR OF THE ESTATE OF CLAUDIO FERNANDO PATINO, DECEASED,

Plaintiff,

- v -

124 RIDGE LLC,

Defendant.

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INDEX NO. 156446/2015

MOTION DATE 12/01/2019

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

124 RIDGE LLC

Plaintiff,

-against-

CASUR MAINTENANCE & MANAGEMENT, INC.

Defendant.

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Third-Party
Index No. 595553/2016

The following e-filed documents, listed by NYSCEF document number (Motion 004) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125

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

In this wrongful death action seeking damages for violations of Labor Law §§ 240(1) and 241(6), it is alleged that Claudio Fernando Patino, now deceased, fell from a ladder at a construction site with no witnesses present. Third-party defendant Casur Maintenance & Management, Inc. (Casur) moves pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's amended complaint as against it. Defendant/third-party plaintiff 124 Ridge LLC (124 Ridge) cross-moves for the same relief. The plaintiff, The Public Administrator of Queens County, as Administrator of the Estate of Claudio Fernando Patino, opposes both Casur's motion and 124 Ridge's cross-motion. The plaintiff also cross-moves for partial summary

judgment against 124 Ridge on its Labor Law §240(1) claim. The defendants' motion and cross-motion are granted in part and the plaintiff's cross-motion is denied.

On December 6, 2014, Patino was working for Casur on a gut-renovation of the building located at 124 Ridge Street in Manhattan when a group of construction workers heard a loud noise and a scream. Moments later, they discovered Patino at the foot of a 12-foot ladder appearing as if he had fallen from it. Patino was rushed to the hospital and passed away shortly after. It is undisputed that Patino's fall took place in a room where a 12-foot ladder was placed such that employees working on the renovation could move between the ground floor and the first floor. It is also undisputed between the parties that Patino's fall was unwitnessed and that the cause of his fall is unknown to any living person.

On June 26, 2016, the plaintiff filed the instant complaint alleging violations of Labor Law §§ 200, 240(1), (2), and (3), and 241(6). On December 1, 2016, the plaintiff was granted leave to file a second amended complaint adding a cause of action for wrongful death. On June 5, 2019, the plaintiff discontinued the claims under Labor Law §§ 200, 240(2), and 240(3).

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

"Labor Law § 240 (1) imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure." Jock v Fien, 80 NY2d 965, 967-968 (1992); see also Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991). "Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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." Ross v Curtis-Palmer Hydro Elec. Co., 81 NY2d 494, 501 (1993). To impose liability under Labor Law § 240(1), the plaintiff must prove a violation of the statute (i.e., that the owner or general contractor failed to provide adequate safety devices), and that the statutory violation proximately caused his or her injuries. See Blake v Neighborhood Hous. Sews. of N.Y. City, 1 NY3d 280 (2003).

"[T]he single decisive question is whether the plaintiff's injuries were 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., supra. The purpose of the statute is to "protect[] 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, 65 NY2d 513, 520 (1985). It is well established that contractors and owners have a statutory duty to provide adequate safety devices for their workers. The failure to provide a safety device is a per se violation of the statute for which an owner/contractor is strictly liable. See Zimmer v Chemung County Performing Arts, supra at 523-524 (1985); Cherry v Time Warner, Inc., 66 AD3d 233 (1st Dept. 2009). The public policy protecting workers requires that the statute be liberally construed. Id. The plaintiff may recover under § 240(1) if he was engaged in an activity covered by the statute and exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. See Jones v 414 Equities LLC, 57 AD3d 65 (1st Dept. 2008).

A fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). See Xidias v Morris Park Contr. Corp., 35 AD3d 850 (2nd Dept. 2006). There must be evidence that the subject ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries. See

Artoglou v Gene Scappy Realty Corp., 57 AD3d 460 (2nd Dept. 2008); Williams v Dover Home Improvement, 276 AD2d 626 (2nd Dept. 2000).

To establish a claim under Labor Law § 241(6), a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury. See Ross v Curtis-Palmer Hydro-Elec. Co., supra. Here, the plaintiffs allege a violation of N.Y.S. Industrial Code Section 23-1.21(b)(4)(iv), which requires that: "When work is being performed from ladder rungs between six and ten feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used."

Casur moves, and 124 Ridge cross-moves, for summary judgment dismissing the plaintiff's claims under Labor Law §§ 240(1) and 241(6), arguing that the plaintiff cannot establish that Patino was injured because of inadequacies in the safety devices provided. Specifically, they claim that the ladder from which Patino fell was properly secured to both the floor and the second floor of the building. In support of their motions, Casur and 124 Ridge submit, *inter alia*, the deposition testimony of Casur's owner Sean O'Sullivan, and the photos taken at the accident location after the accident occurred. O'Sullivan's deposition testimony states that he learned of Patino's accident approximately two hours after it occurred, and that later that day he visited the work site and observed that the ladder that Patino fell from was properly secured to the first and second floors of the building. O'Sullivan also states that safety equipment such as harnesses, hardhats, and goggles were provided to all employees and were also readily available at the worksite. By these submissions, defendants Casur and 124 Ridge meet their initial burden on the motion and cross-motion.

In opposition and in support of its cross-motion, the plaintiff argues that O'Sullivan's statements regarding the ladder being secured are not accurate. In support of its position, the plaintiff submits, *inter alia*, a series of OSHA reports wherein Casur received fines for (i) failing to report Patino's accident within eight hours, as required and (ii) failing to properly instruct employees on ladder safety. The plaintiff further submits the portions of O'Sullivan's deposition

testimony in which he states that he (i) did not visit the worksite on the day of Patino's accident until over two hours after it occurred, (ii) had no personal knowledge of the condition of the ladder at the time of the accident, and (iii) failed to report Petino's fall to OSHA for over two days. The plaintiff also contends that the pictures submitted showing the ladder being properly secured were taken during the OSHA investigation which occurred over two days after the accident. As such, the plaintiff raises a triable issue of fact regarding O'Sullivan's credibility that is best determined by a finder of fact and not on summary judgment. See Vega v. Restani Const. Corp., 18 NY3d 499 (2012); cf. Rivera v. Dafna Constr. Co., Ltd., supra; McCaffery v. Wright & Co. Const., 71 AD3d 842, (2nd Dept. 2010). As there is a triable issue of fact as to whether the ladder was properly secured to the ground and to the point of contact with the second floor at the time of Patino's fall, Casur's motion for summary judgment and 124 Ridge's cross-motion for summary judgment to dismiss the plaintiff's Labor Law §§ 240(1) and 241(6) claims are denied, and the plaintiff's cross-motion for partial summary judgment on its Labor Law § 240(1) claim is denied for the same reason.

Accordingly, it is hereby,

ORDERED that upon the plaintiffs' notification of partial discontinuance in their opposition papers, the first cause of action of the complaint is dismissed to the extent it alleges claims for common law negligence and violations of Labor Law §§ 200, 240(2), and 240(3) and it is further;

ORDERED that the motion of Casur Maintenance & Management, Inc. for summary judgment dismissing the plaintiff's remaining claims under Labor Law §§ 240(1) and 241(6) is denied; and it is further,

ORDERED that the cross- motion of 124 Ridge LLC's for summary judgment dismissing the plaintiff's remaining claims under Labor Law §§ 240(1) and 241(6) is denied; and it is further,

ORDERED that the plaintiff's cross-motion for partial summary judgment on its Labor Law § 240(1) claim is denied; and it is further

ORDERED that the parties are to contact chambers, no later than May 31, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the Court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/05/2020
DATE

NANCY M. BANNON, J.S.C.

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