SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

PING LIN,

Plaintiff,

- v -

100 WALL STREET PROPERTY L.L.C., GANT U.S.A. CORPORATION, and CDC HOUSING, INC.

Defendants.

----------X

INDEX NO. 160605/2015

MOTION DATE 01/30/2019

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168

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

In this personal injury action, the plaintiff moves for summary judgment on the issue of liability pursuant to Labor Law § 240(1). Defendants 100 Wall Street Property L.L.C. (100 Wall), Gant U.S.A. (Gant), and CDC Housing, Inc. (CDC) oppose the motion. The motion is denied.

It is undisputed that 100 Wall owns the premises located on the 7th floor of 100 Wall Street (the premises) and that on the day of the plaintiff's accident, Gant was leasing the premises from 100 Wall. By construction management agreement dated December 23, 2014, Gant hired CDC to act as general contractor on a renovation project at the premises. The plaintiff was employed by nonparty Yep Group (Yep) on the date of his accident. The plaintiff testified at his deposition that he was employed by Yep to install sheet rock in or around the ceiling of the premises. While attempting to install the sheet rock, he was standing on a step in the middle of a six-foot ladder when he lost his balance and fell. The plaintiff claims that sheet rock hit him on his way down and that he broke his arm falling from the ladder. While the complaint pleads causes of action, this motion is limited to the third cause of action, alleging liability under Labor Law § 240(1).

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, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). 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, 68 NY2d 320 [1986]; 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 at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

Labor Law § 240 (1), provides, in relevant part, as follows:

> "All contractors and owners and their agents 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) 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); Willinski v 334 East 92nd Housing Development Fund Corp., 18 NY3d 1 (2011). 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., 13 NY3d 599, 603 (2009). 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). There "is no bright-line minimum height differential that determines whether an elevation hazard exists. See Thompson v St. Charles Condominiums, 303 AD2d 152 (1st Dept. 2003); Arrasti v HRH Constr., LLC, 60 AD3d 582 (1st Dept. 2009) [18 inches sufficient to create an elevation hazard under Labor Law § 240(1)]; Lelek v Verizon N.Y., Inc., 54 AD3d 583 (1st Dept. 2008) [liability under Labor Law § 240(1) resulting from a fall from only two and a half to three feet].

While "an unsecured ladder that moves or shifts constitutes a prima facie violation of Labor Law §240(1)" (Kehoe v 61 Broadway Owner LLC, 180 AD3d 618, 619 [1st Dept. 2020]), a fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1). See Willliams v Dover Home Improvement, Inc., 276 AD2d 626 (2nd Dept. 2000). "'A mere fall from a ladder or other similar safety device that did not slip, collapse or otherwise fail is insufficient to establish that the ladder did not provide appropriate protection to the worker.'" McGill v Qudsi, 91 AD3d 1241, 1243 (3rd Dept. 2012), quoting Briggs v Halterman, 267 AD2d 753, 755 (3rd Dept. 1999). If there is no showing that the ladder was defective, a question of fact arises as to whether the ladder provided proper protection. See Antenucci v Three Dogs LLC, 41 AD3d 205 (1st Dept. 2007). The defendant would not be liable if plaintiff simply lost his balance or footing while working on a properly secured ladder that did not malfunction or if the ladder was an appropriate safety device. . See Antenucci v Three Dogs LLC, supra; Teplitskaya v 3096 Owners Corp., 289 AD2d 477 (2nd Dept. 2001). Furthermore, "[a]n independent intervening act may constitute a superseding cause, and be sufficient to relieve a defendant of liability." Gordon v Eastern Railway Supply, Inc., 82 NY2d 555, 562 (1993); Morera v New York City Transit Auth., __ AD3d __ , 2020 WL 2067828, (1st Dept April 30, 2020) [falling ceiling tile may be superseding cause of fall from ladder].

In support of the motion, the plaintiff has submitted, *inter alia*, the deposition transcripts of the plaintiff and George King, the representative of the plaintiff's employer, Yep, and the expert report of Kathleen Hopkins. These submissions fail, *prima facie*, to eliminate triable issues of fact as to whether the defendants are liable under Labor Law § 240(1).

The plaintiff, who was the sole witness to the accident, provided at least two different versions of the accident, one at his deposition and one to his employer. At his deposition, the plaintiff testified that the 6-foot ladder he was provided was an inadequate safety device because he had to use both of his hands to install the sheetrock and could not maintain his stability on the ladder. However, Lin's employer, Mr. King, who is not a party to this action, testified at his deposition that the plaintiff told him immediately after the accident that he merely slipped when he was trying to reach for something and lost his balance. The plaintiff's submissions of conflicting accounts in support of his motion is sufficient itself to raise a triable issue of fact. See Noble v 260-261 Madison Ave. LLC, 100 AD3d 543 (1st Dept. 2012).

Moreover, in opposition, the defendants submitted, *inter alia*, the affidavit of the defendant's expert witness Terrence Fearon. His affidavit directly disputes the plaintiff's expert Kathleen Hopkins affidavit averring that the defendants should have provided a lift. Fearon opines that a ladder was an adequate safety device. The conflicting testimony of these two experts is also sufficient itself to raise a triable issue of fact such that summary judgment is not warranted. See O'Brien v Port Authority of New York and New Jersey, 29 NY3d 27 (2017); Morera v New York City Transit Auth., supra; Friedman v BHL Realty Corp., 83 AD3d 510 (1st Dept. 2011).

The defendant's submissions also raise triable issues of fact as to whether the plaintiff was a recalcitrant worker who disregarded King's advice to use an eight-foot ladder rather than a six-foot ladder. A recalcitrant worker defense relieves a party of liability under Labor Law § 240(1) where there was an adequate and available safety device of the type listed in § 240(1) which was provided for the plaintiff's use, the plaintiff was expected to use the device, the plaintiff voluntarily elected not to use the device and had plaintiff used the device, the injury would have not occurred. See Stolt v General Foods Corp, 81 NY2d 918 (1993); Gonzalez v Rodless Properties, L.P., 37 AD3d 180 (1st Dept. 2007); Mayancela v Almat Realty Dev. LLC, 303 AD2d 207 (1st Dept. 2003). As observed by the defendants, the proof submitted demonstrates that an eight-foot ladder was available at the job site as the plaintiff had used an

eight-foot ladder earlier that day to complete another task at the site. King also testified that he specifically told the plaintiff to use an eight-foot ladder 20 minutes before the plaintiff's alleged accident, but that the plaintiff chose to use the six-foot ladder instead. Additionally, the defendants correctly argue that their recalcitrant worker defense is supported by the plaintiff's own deposition testimony that the six-foot ladder was sufficient for the work he was performing because he was able to place the palm of his hand on the beam where he was installing the sheet rock. The defendants point out that the testimony showed that the beam was approximately 10 feet high and the ceiling was approximately 11 to 12 feet high. It is undisputed that the plaintiff is approximately 5 feet 4-1/2 inches tall and has a reach of a foot to a foot and a half above his head. The proof submitted shows that, at the time of his accident, he was approximately 3 feet 9 inches off the ground, or halfway up the ladder. Thus, the highest he could have reached comfortably above his head from his location on the six-foot ladder was 10 feet 7 ½ inches, not 11 or 12 feet, and he would not have been able to place his palm 11 to 12 feet high, as he claimed. On the other hand, if the plaintiff had used the eight-foot ladder, as directed, he would have been able to safely reach a maximum working surface height of between 12 feet ½ inch and 12 feet 6 ½ inches.

Accordingly, it is,

ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) is denied.

This constitutes the Decision and Order of the Court.

NANCY M. BANNON, J.S.C.

5/13/2020
DATE

HON. NANCY M. BANNON

CHECK ONE:							
		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER