SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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ERALDI OCKA, ISILDA OCKA,

Plaintiffs,

- v -

THE NEW YORK CITY DEPARTMENT OF EDUCATION, THE CITY OF NEW YORK, THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY

Defendants.

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INDEX NO. 161240/2017

MOTION DATE 09/25/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 90, 91, 94, 98, 99, 100, 101

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

Plaintiffs' motion for summary judgment is granted in part and denied in part.

Background

Plaintiff Eraldi Ocka claims that he was working at a construction project at a school when he fell off a scaffold on the roof. On the night of the accident, Mr. Ocka says he was assigned to dismantle existing scaffolding on the roof. He contends that as he bent down to remove a piece of the scaffold, the portion he was standing on moved, which caused him to lose his balance and fall from the scaffold about eight to ten feet down to the roof itself. Plaintiffs move for summary judgment on their Labor Law §§ 240(1) and 241(6) claims.

In opposition, defendants contend that Mr. Ocka has not met his burden to show that he fell because of an inadequate or defective safety device. They emphasize that there are issues of fact with respect to whether any adequate safety device could have prevented his fall and observe that Mr. Ocka testified that he simply lost his balance. With respect to the 241(6) claim,

defendants assert that the specific Industrial Code Section at issue (23-51.[h]) is not applicable because the absence of a supervisor for the removal of the scaffolding had nothing to do with Mr. Ocka's fall.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Labor Law § 240(1)

"Labor Law § 240(1), often called the 'scaffold law,' provides that all contractors and owners . . . shall furnish or erect, or cause to be furnished or erected . . . 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 construction workers employed on the premises" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 499-500, 601 NYS2d 49 [1993] [internal citations omitted]). "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" (*id.* at 501).

"[L]iability [under Labor Law § 240(1)] is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough" (*Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 287, 771 NYS2d 484 [2003]).

The Court grants this branch of the motion. There is no dispute that this was an elevation-related accident where Mr. Ocka fell 8-10 feet while removing a scaffold. There is also no dispute that Mr. Ocka was not provided with any safety equipment such as a harness that might have prevented the fall. Defendants' opposition asserts that the absence of harnesses merely presents a triable issue of fact—this Court disagrees. The record before this Court demonstrates that the scaffold shifted, plaintiff lost his balance and then fell. That states a prima facie basis for a Labor Law § 240(1) claim.

Labor Law § 241(6)

"The duty to comply with the Commissioner's safety rules, which are set out in the Industrial Code (12 NYCRR), is nondelegable. In order to support a claim under section 241(6) .

. . the particular provision relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515, 882 NYS2d 375 [2009]). "The regulation must also be applicable to the facts and be the proximate cause of the plaintiff's injury" *(Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 271, 841 NYS2d 249 [1st Dept 2007]).

The Court denies the motion to the extent it sought summary judgment on plaintiff's 241(6) claim. There is an issue of fact regarding whether the lack of supervision was a proximate cause of Mr. Ocka's injury. According to Mr. Ocka, he fell when the scaffold moved and he lost his balance. It is not clear how the lack of supervision was a proximate cause of the accident; rather, it appears that the lack of a harness or other safety device (as alleged in plaintiffs' Labor Law § 240[1] claim) was a proximate cause of Mr. Ocka's fall. It may be that plaintiffs can prove at trial that the lack of supervision was a cause of the fall but on these papers the Court cannot grant summary judgment on this claim.

Accordingly, it is hereby

ORDERED that the motion for partial summary judgment on liability by plaintiffs is granted on the branch of the motion brought pursuant to Labor Law § 240(1) and denied to the extent it sought summary judgment under Labor Law § 241(6).

9/30/2020
DATE

ARLENE P. BLUTH, 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**