SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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ANA NAJERA,

Plaintiff,

- v -

BERNSOHN & FETNER, LLC, SUGAR SHACK LLC,

Defendant.

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INDEX NO. 151162/2016

MOTION DATE 07/31/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

BERNSOHN & FETNER, LLC

Plaintiff,

-against-

KOENIG IRON WORKS, INC.

Defendant.

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Third-Party
Index No. 595384/2016

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77

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

In this action arising out of a workplace accident that occurred on March 21, 2015, plaintiff Ana Maria Najera, as Administratrix of the Estate of Fredy Aguirre, moves, pursuant to CPLR 3212, for partial summary judgment on the issue of defendant Bernsohn & Fetner, LLC's (B&F) liability under Labor Law § 240 (1).

Background

Defendant Sugar Shack, LLC (Sugar Shack) is the owner of a single-family townhouse located at 4 East 75th Street, New York, New York (the Premises) (NY St Cts Elec Filing [NYSCEF] Doc No. 45, David A. Lebowitz (Lebowitz) affirmation, exhibit 12, ¶¶ 1 and 4).

Sugar Shack retained B&F as its construction manager to oversee a gut renovation of the Premises (id., ¶ 5; NYSCEF Doc No. 34, Lebowitz affirmation, exhibit 1 at 1). B&F subcontracted the structural steel work to third-party defendant Koenig Iron Works, Inc. (Koenig) (NYSCEF Doc No. 48, Lebowitz affirmation, exhibit 15 at 1). Koenig employed plaintiff's decedent, Fredy Aguirre (Aguirre) (NYSCEF Doc No. 43, Lebowitz affirmation, exhibit 10, ¶ 9). Aguirre passed away within hours of the accident.

Salomon R. Tapia (Tapia), a Koenig ironworker, describes the accident in a sworn statement dated June 17, 2015 (NYSCEF Doc No. 38, Lebowitz affirmation, exhibit at 1). Tapia states that he and Aguirre were working at the Premises with a "brand new ... 'A type ladder'" (id.). Aguirre "had to cut some bolts, so he stepped up the ladder" (id.). Aguirre had no harness and "[t]he ladder was not secured with anything or leaning against a wall" (id.). Tapia states that Aguirre's task involved the use of an electric grinding machine, which had to be held with both hands (id. at 1-2). After noticing that the grinder was causing "sparks," Tapia advised Aguirre to place a plastic cover on the beams overhead (id. at 2). Tapia explains that he was working with his back to Aguirre when he "heard a bang, followed by Fredy asking me for help" (id. at 2). Aguirre states that when he looked back, he "saw Fredy on the ground on top of the ladder" (id.).

Tapia adds to this account in an October 15, 2019 affidavit (NYSCEF Doc No. 55, Steven R. Goldstein (Goldstein) aff, exhibit B at 5). Tapia attests that he, Aguirre and a third Koenig employee drove to the Premises from Koenig's yard/shop with a "brand new 10 footstep or A-frame ladder" (id. at 2). As Koenig's foreman (id. at 1), he tasked Aguirre with cutting part of the threaded bolts from the underside of an overhang or balcony with a "grinder" to which a "cutting wheel" was affixed (id.). Tapia states that he personally set up the ladder beneath the

balcony on top of a flat concrete patio (id. at 3). The "ladder was stable and sturdy" when Tapia climbed up, and it did not "shake, twist, tip or move" (id.). Tapia confirms that cutting the bolts, which he likened to the downward motion used to cut a slice of bread with a knife (id. at 2), required the use of two hands, but "this work did not require Fredy to move outside of the end/side rails on the front of the ladder or climb over and straddle the ladder" (id. at 4). In addition, Tapia states that "Fredy did not raise any concerns, make any complaints or ask for different equipment" (id.), and that Aguirre was able to ascend and descend from the ladder numerous times before the accident without incident (id. at 5).

Alan Guthertz (Guthertz), Koenig's chief financial officer, confirms that the 10-foot ladder had been purchased shortly before the accident (NYSCEF Doc No. 54, Goldstein aff, exhibit A at 1-2). Koenig's records include copies of Aguirre's OSHA 10-hour training course certificate, New York City welder's license, New York State welder qualification certificate and New York City Department of Building's scaffold user certificate (id. at 2). Guthertz states the ladder was transported to Koenig's premises after the accident, where it has remained since (id. at 3). Both Tapia and Guthertz describe Aguirre as having prior experience welding on ladders (NYSCEF Doc No. 54 at 2; NYSCEF Doc No. 55 at 3).

Plaintiff, Aguirre's widow (NYSCEF Doc No. 43, ¶ 7) commenced this action on February 12, 2016 by filing a summons and complaint asserting the following five causes of action against defendants: (1) wrongful death; (2) negligence; (3) an alleged violation of Labor Law § 200; (4) an alleged violation of Labor Law § 240 (1); and, (5) an alleged violation of Labor Law § 241 (6). After B&F and Sugar Shack interposed an answer, they commenced a third-party action against Koenig for common-law contribution and indemnification, contractual indemnification, and breach of contract for failing to procure insurance.

The Parties' Contentions

Plaintiff now moves for partial summary judgment against B&F on her fourth cause of action alleging a violation of Labor Law § 240 (1). She relies on an affidavit from Neal A. Growney (Growney), a licensed professional engineer who reviewed the security video taken of the accident and OSHA's records for the accident (NYSCEF Doc No. 35, Lebowitz affirmation, exhibit 2, ¶¶ 1 and 3). Growney avers the video captures Aguirre working for nearly one hour on a Featherlite model 6910 10-foot stepladder (id., ¶¶ 4-5). Prior to his fall, Aguirre stood with both feet on the ladder's eighth step (id., ¶ 5), which is 90 inches or 7 feet 6 inches above the ground (id., ¶ 9). Aguirre "swung his left leg out and around the top of the ladder to its rear where he placed his left foot on a horizontal brace in the rear legs … [and] straddled the ladder's top" (id.). He placed his right foot "angularly" on the center of the eighth step and began to operate the handheld grinder (id., ¶ 6), although his hands and the grinder are not visible in the video (id., ¶¶ 9-10). Aguirre then "swung his left leg back around from the stepladder's rear and towards its front. His left foot appears "to contact an area which included his right foot and/or the step; and the ladder tipped towards the right. Mr. Aguirre fell toward his left" (id.). Growney does not state how far above the ground the bolts were located, but, taking into account Aguirre's height of five feet seven inches, he surmises that the "actual height of the incident bolts above grade could be higher" than 10 feet (id., ¶ 11).

Growney opines that a worker must always maintain three-points of contact to work safely on a ladder (NYSCEF Doc No. 35, ¶¶ 20 and 23). Safe operation of a handheld grinder such as the one involved in the accident requires the use of both hands (id., ¶ 18). Growney states that a handheld grinder produces "reactive torque (recoil) when the rotating grinder wheel is applied" (id., ¶ 16). Aguirre would have "experience[d] a lateral force (sideways thrust)

applied to his arms from the grinder's rotational force" that must be "resisted" by the ladder (id., ¶ 30). He explains that "[a] stepladder has a far greater ability to resist a tip-over from forces applied back to-front and front-to-back than applied laterally to its side" (id., ¶ 33). He claims that Aguirre's stance in straddling the ladder, which is an unsafe practice (id., ¶ 37), could increase the "tip-over resistance to a laterally applied force, such as from a person's left foot striking the ladder and/or his right foot impulse/reactive push to the right" (id., ¶ 36). Lebowitz concludes that the ladder did not afford Aguirre proper protection because he could not maintain three points of contact with the ladder while safely operating grinder (id., ¶ 26). He identifies a scaffold, scissor lift, articulated man-lift, hydraulic lift, platform ladder or manually propelled mobile ladder as alternative devices that could have been furnished to Aguirre (id., ¶¶ 43-44).

Koenig advances three arguments in opposition. First, it submits that the motion is premature since no depositions have been held. Second, Koenig argues that none of plaintiff's evidence, such as a weather report and Aguirre's medical records, is admissible. Significantly, the security video footage is neither certified nor authenticated, and plaintiff has not attempted to establish a foundation for its admissibility. Third, assuming plaintiff's proof is admissible, Koenig contends that Aguirre was the sole proximate cause of the accident. In support of this last contention, Koenig tenders an affidavit from its expert, Bernard Lorenz, P.E. (Lorenz), who inspected the subject ladder, the rear courtyard where the accident occurred, the OSHA records, and the security video (NYSCEF Doc No. 56, Goldstein aff, exhibit C at 2-3).

Lorenz opines that the ladder furnished to Aguirre "was an adequate and appropriate safety device for the work activity – as long as it was used correctly," and that the work could have been performed without Aguirre having had to straddle, sit or stand on the top cap of the ladder (NYSCEF Doc No. 56 at 3). In particular, Lorenz submits that the ladder was equipped

with several warning label and safety instructions in English and Spanish (id. at 3-4). These instructions warned the user to refrain from sitting or standing on the topmost portion of the ladder or standing on the rear brace (id. at 4). Lorenz also states that it is unclear what Aguirre was doing when he was straddling the steps and the rear brace, since the video depicts him from the waist down (id. at 4). As such, Growney's claim of lateral force or "torque" caused by grinding or shaving the bolts, as opposed to cutting them, is entirely speculative (id. at 4-5). Moreover, he submits that the video does not show Aguirre actively cutting or grinding a bolt in the moments immediately preceding the accident (id. at 6). Instead, his "self-created precarious position, as his left foot came back around … created a lateral force which caused the ladder to tip and fall over" (id.). Lorenz further opines that, based on his inspection of the Premises, Aguirre could have repositioned the ladder had he wanted to cut a bolt from a different position (id. at 5).

B&F and Sugar Shack (together, B&F) oppose the motion on the ground that the security video is inadmissible. B&F additionally contends that Aguirre's actions were the sole proximate cause of the accident, since he ignored the safety instructions on the ladder stating that the user must keep his or her body centered between the side rails; should not climb, stand or sit above the second rung from the top of the ladder; and, should not straddle the front and back of the ladder.

B&F also proffers an affidavit from John P. Coniglio (Coniglio), a certified safety professional who inspected the accident location (NYSCEF Doc No. 63, Michael P. Hess [Hess] affirmation, exhibit D, ¶¶ 2 and 7). Coniglio avers that height of the ceiling beam Aguirre is alleged to have worked on is 13 feet 4 ½ inches high (id., ¶ 10). Working on the eighth step of the ladder is permissible, and after accounting for his height, Aguirre's head would have been

level at 13 feet 1 inch (id.). Coniglio opines that "[t]his height is more than adequate to allow for arm movement and to reach the work area" (id.). Additionally, Coniglio states that use of a handheld grinder while standing "on a step ladder is safe and the acceptance range of tasks for ladder work" (id., ¶ 11). Coniglio further states that one of the OSHA violations issued to Koenig for "Using a Ladder in a manner than Prescribed by the manufacturer"; the manufacturer had warned the user against straddling the ladder (id., ¶ 12). Coniglio disputes Growney's assertion that three points of contact are always required while working on a ladder, since the instructions Growney references in his affidavit pertain to maintaining three points of contact while ascending or descending a ladder (id., ¶ 15). Coniglio submits that Aguirre was not ascending or descending the ladder at the time he fell.

Plaintiff, in reply, submits that defendants' contentions concerning the admissibility of the evidence are meritless, as the video had been provided to plaintiff's investigator by one of defendants' agents. Amanda Herman (Herman), an investigation department specialist at a litigation support firm, avers that she spoke to Dana Stanley (Stanley), the estate manager for the Premises, on or about May 18, 2015 (NYSCEF Doc No. 69, Lebowitz affirmation, exhibit 19, ¶¶ 1-2). Herman states that she received a copy of the surveillance footage and transmitted same to plaintiff's counsel on June 4, 2015 (id., ¶¶ 5-6).

In his reply affidavit, Growney submits that the video depicts a grinding tool as opposed to a cutting wheel (NYSCEF Doc No. 68, Lebowitz affirmation, exhibit 18, ¶ 6). If use of the grinder on the threaded bolts caused sparks, then it is "reasonably foreseeable that a person performing such grinding will likely consider moving to steps other than the ladder's eighth step in order to avoid such sparks" (id., ¶ 19). He repeats his position that three points of contact with the ladder must be maintained at all times (id., ¶¶ 12-13), especially if the grinder "kick[ed]

back" (id., ¶ 20). Based on the ladder manufacturer's risk assessment matrix, Aguirre's work would likely result in a fall (id., ¶¶ 28-29). Growney concludes that a substantial cause of Aguirre's injuries was the failure to furnish or erect a device to properly protect him (id., ¶ 33).

Discussion

On a motion for summary judgment, the moving party "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 Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party fails to meet its prima facie burden, the motion will be denied, "regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Preliminarily, the court finds that the majority of plaintiff's proof is not in admissible form. Koenig correctly observes that the weather report and Aguirre's medical records are not certified or authenticated. Importantly, Koenig and B&F challenge the admissibility of the surveillance video, which is not certified or authenticated. Absent a proper foundation, none of this proof is admissible (see *Ramirez v Elias-Tejada*, 168 AD3d 401, 405 [1st Dept 2019] [finding that the plaintiffs failed to support their motion for summary judgment with medical records sworn to or certified in accordance with CPLR 4518 (c)]; *Torres v Hickman*, 162 AD3d 821, 823 [2d Dept 2018] [concluding that the failure to authenticate a videotape rendered it

inadmissible]; *Morabito v 11 Park Place LLC*, 107 AD3d 472, 472 [1st Dept 2013] [discussing the admissibility of weather reports]). To the extent that Growney relied on this inadmissible proof, then his opinion is likewise inadmissible (see *Concepcion v Walsh*, 38 AD3d 317, 319 [1st Dept 2007] [concluding that the expert's opinion was conclusory and speculative since the expert improperly relied on an unsworn, inadmissible report prepared by another]).

Plaintiff's attempt to remedy this deficiency, at least as to the security video, in reply is insufficient (see *Nicaj v Bethel Woods Ctr. for the Arts, Inc.*, — AD3d —, 2020 NY Slip Op 07318, *2 [1st Dept 2020] [concluding that the plaintiff failed to properly authenticate audio recordings]; *Read v Ellenville Natl. Bank*, 20 AD3d 408, 409-410 [2d Dept 2005] [finding that an affidavit was insufficient to authenticate a videotape]). "Similar to a photograph, a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted" (*People v Patterson*, 93 NY2d 80, 84 [1999]). "Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering" (id.). Testimony from the videographer with personal knowledge attesting that the video has not been altered or edited suffices (see *Zegarelli v Hughes*, 3 NY3d 64, 69 [2004]).

While Herman avers that the video purports to depict the accident, her statement is inadmissible hearsay, as it is based on her recollection of a conversation she had with Stanley (see e.g. *Fay v Vargas*, 67 AD3d 568, 568 [1st Dept 2009] [reasoning that "[t]he officer's affidavit vouching for the truth of his report does not render admissible the hearsay statements contained in the report"]). There is no testimony from Herman, Stanley or anyone discussing the surveillance system at the Premises, how that system is maintained, and whether the video fairly

and accurately depicts the accident (see *Read*, 20 AD3d at 409-410). Thus, the weather report, medical records and security video are not in admissible form, and will not be considered. Similarly, the portion of Growney's affidavit and his opinion based on viewing the video is inadmissible.

The court turns next to the balance of plaintiff's proof in support of the motion. Labor Law § 240 (1) provides in pertinent 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.

It is well settled that "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] [emphasis in original]). The statute "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 521 [1985], rearg denied 65 NY2d 1054 [1985] [internal quotation marks and citation omitted]). Thus, in order to prevail on a Labor Law § 240 (1) claim, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the injury (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Once a plaintiff establishes that a violation of the statute proximately caused the injury, then an owner or contractor is subject to "absolute liability" (see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], citing *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995], rearg denied 87 NY2d 969 [1996]).

Initially, the court notes that B&F does not dispute that it is a "contractor" for purposes of imposing liability under the Labor Law. As is relevant here, "[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[s] steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016] [internal quotation marks and citation omitted]). The fact that an accident is unwitnessed is no bar to recovery (see *Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018]).

Applying these precepts, the court finds that plaintiff has demonstrated that the ladder furnished to Aguirre was inadequate to shield him from an elevation-related risk, and that this violation of the Labor Law was a proximate cause of the injuries (see *Nieto v CLDN NY LLC*, 170 AD3d 431, 432 [1st Dept 2019]). Plaintiff has established that Aguirre's task of cutting threaded bolts constitutes a protected activity, and defendants have not challenged this point. Tapia's sworn statement that he heard a "bang" followed immediately by his observation that he saw both plaintiff and the ladder lying on the ground is sufficient to conclude that the equipment provided to Aguirre was inadequate. Indeed, Tapia had explained that the subject ladder was "not secured" prior to the accident. While defendants maintain that the ladder was adequate for Aguirre to reach the bolts beneath the balcony, the ladder does not appear to have been adequate to shield Aguirre from falling (see *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002] [stating that "[i]t is sufficient for purposes of liability under section 240 (1) that adequate safety devices ... to protect plaintiff from falling were absent"]).

Defendants' argument that the ladder was not defective is insufficient to raise a triable issue of fact (see *Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433, 433-434 [1st Dept

2015], appeal dismissed 26 NY3d 1021 [2015] [stating that "[w]e do not simply hold that 'a plaintiff-worker's testimony that he fell from a non-defective ladder while performing work ... alone establish[es] liability under Labor Law § 240 (1).' Rather, it is undisputed that no equipment was provided to plaintiff to guard against the risk of falling from the ladder while operating the drill"]; *Cruz v Turner Constr. Co.*, 279 AD2d 322, 323 [1st Dept 2001] [reasoning that "even though the ladder itself was not structurally defective, as a matter of law it became defective inasmuch as it was clearly inadequate to protect plaintiff from the foreseeable risk of being caused to fall from it while he was performing his job]). In fact, the plaintiff need not show the ladder was defective (see *Sacko v New York City Hous. Auth.*, 188 AD3d 546, 547 [1st Dept 2020]), as a fall from "an unsecured ladder, even one in good condition, can give rise to Labor Law § 240 (1) liability" (*Noor v City of New York, 130* AD3d 536, 539 [1st Dept 2015], lv dismissed 27 NY3d 975 [2016]).

Defendants' contention that Aguirre was the sole proximate cause of the accident is equally unpersuasive. The sole proximate cause defense "applies where the worker misused, removed, or failed to use an available safety device that would have prevented the accident, or knowingly chose to use an inadequate device despite the availability of an adequate device" (*Boyd v Schiavone Constr. Co., Inc.*, 106 AD3d 546, 548 [1st Dept 2013]). Where the plaintiff is the sole proximate cause of the accident, a defendant will not be liable under Labor Law § 240 (1) (see Blake, 1 NY3d at 290). Here, defendants failed to establish whether another adequate device was available, and that Aguirre deliberately chose not to use it (see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006] [reasoning that the plaintiff's action of falling from the top of a ladder that was too short for the task at hand was the sole proximate cause of his injuries]). The evidence herein demonstrates

that the ladder was the only device available to him. Defendants' assertion that Aguirre failed to comply with the safety instructions affixed to the ladder implicates his comparative negligence (see *Sacko*, 188 AD3d at 547), but comparative or contributory negligence is no defense to Labor Law § 240 (1) (see *Ross*, 81 NY2d at 501 n 4). In any event, a safety instruction is not the equivalent of a safety device within the meaning of the Labor Law (see *Hill v Acies Group, LLC*, 122 AD3d 428, 429 [1st Dept 2014]). Accordingly, it is

ORDERED that the motion of plaintiff Ana Maria Najera, as Administratrix of the Estate of Fredy Aguirre for partial summary judgment on the issue of the liability or defendant Bernsohn & Fetner, LLC under Labor Law § 240 (1) (motion sequence no. 001) is granted; and it is further

ORDERED that the action shall continue as to the remaining causes of action; and it is further

ORDERED that a trial on the issue of plaintiff's damages on the Labor Law § 240 (1) claim shall be had before the court together with a trial on liability and damages on plaintiff's remaining claims.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of this court.

1/12/2021
DATE

W. FRANC PERRY, 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