SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **IAS MOTION 46**

Justice

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COREY BROADNAX,

Plaintiff,

- v -

RIVERSIDE CENTER SITE 5 OWNER LLC,TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendant.

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INDEX NO. 155948/2016

MOTION DATE 02/11/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

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

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment pursuant to CPLR 3212 on its Labor Law §240(1) claim is determined as follows:

Plaintiff commenced the instant action to recover for injuries he allegedly sustained as a ironworker at a construction project located at 600 West 59th Street, Manhattan, New York on July 8, 2016. It is undisputed that defendant Riverside Center Site 5 Owner LLC ("Riverside") was the owner of the property and that Tishman Construction Corporation of New York ("Tishman") was the general contractor of the construction project. Plaintiff alleges that on the date of the accident, he was struck on the head and neck by an unsecured hoist ladder that fell as plaintiff was waiting for a hoist in the loading dock area. Plaintiff now seeks summary judgment pursuant to Labor Law §240(1), arguing that defendants failed to adequately secure the ladder to the temporary wall with a brace, sling, hanger, or other device that would have prevented his injury.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form, demonstrating the absence of any triable issues of fact, and establishing

entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of the motion, the plaintiff submits, *inter alia*, the expert affidavit of Douglas D. Miller, the deposition testimony of plaintiff and that of defendant Tishman's employee, Jeffrey Helitzer, and Tishman's incident report.

Plaintiff Broadnax averred that on the day of the accident he was working at the "Riverside project" as an ironworker and employee of Metal Sales/W and W Glass. He stated that just prior to the accident, he and his co-worker, Marvin, had used an A-frame cart to bring stainless steel panels in from the outside. He recalled that they were waiting to obtain a hoist to bring the panels up to approximately the fifth floor when, all of the sudden, he felt something hit him and then heard the crash of the ladder.

Broadnax further claimed that the ladder that struck him was a standard one sided, all steel, hoist ladder that was previously hanging on the wall. He stated that the ladder weighed approximately 40 to 50 pounds, was about 8 and 1/2 feet high, and was often in the hoist, so he assumed it belonged to the hoist operators. Plaintiff alleged that he felt a heavy impact to the back of his head, which made his head go forward and to the right. He stated that he had thought that someone had hit him with a bat and that the contact knocked his hard hat off. He claimed that after he was struck, he turned around in "defense mode" but then controllably fell to the ground in pain upon realizing it was caused by the ladder and that he was not in a fight. He stated that he laid

there for approximately 10 minutes until he spoke with a safety supervisor and was eventually taken away by ambulance.

He testified that before it fell, the ladder was hanging vertically, straight up on the wall, not on hooks but from metal that was protruding. He further stated that despite working in that area often, he had never seen the ladder hanging on the wall because it was not supposed to be. He clarified it was an OSHA violation and unwritten rule that ladders not in use should be laid against on their side against the floor. Additionally, he recounted that as he was waiting for the hoist, he had his back to the subject wall and was approximately 3 feet away from it. Further, he stated that he is 6 feet one inches tall.

Helitzer testified that he is a project engineer for defendant Tishman, but at the time of the accident he was a purchasing assistant on the subject project. Helitzer averred that he performed much of his job from the field office, but occasionally had to go into the field as it was his responsibility to generate incident reports as needed. He recalled that on July 8, 2016, upon being informed of the accident, it was his responsibility to investigate plaintiff's accident.

He stated that within 10 minutes of hearing about the accident, he went to the location of the accident and took pictures of the ladder on the ground near the hoist platform. Helitzer alleged that he was the individual responsible for filling out the Tishman general contractor incident report form, which he did on the day of the accident. He claimed that he did not remember if he spoke with plaintiff Broadnax but clarified that when he wrote "he states" in the report, he is referring to Broadnax.

Upon being shown a video of the accident, Helitzer stated that both the subject wall and the ladder were 8 to 9 feet tall. He further observed that the ladder was not secured to the wall in any way and watched it strike plaintiff's head. Helitzer then explained that as part of his job he could

stop work and make the correct calls to get unsafe conditions remediated. He stated that if he had seen the ladder in the unsafe condition that it was, he would have dismantled it, either on his own or with help depending on its weight.

The Tishman incident report submitted stated that "Corey Brondnax" had his head and neck affected after he was struck by a ladder at the loading dock near the hoist while waiting for the hoist. It further states that, "[Broadnax] was standing by the hoist on the loading dock when a hoist ladder that was hanging on the wall fell off hitting him in the back of the head. [Broadnax] states that he blacked out for a few seconds and fell to the ground complaining of head neck pain and dizziness."

Douglas D. Miller averred that he is an experienced health and safety consultant and the President of Occupational Safety Consultants.[1] He claimed to have extensive knowledge in OSHA, ANSI, New York State Labor Law, New York State Building Codes, scaffold and ladder safety, accident investigation, employee safety and to have been qualified as an expert in Federal Court, New York State Supreme Court and New York State Court of Claims. In developing his opinion, he reviewed, *inter alia*, plaintiff's deposition transcript, Jeffrey Helitzer's deposition transcript, the Tishman GC incident report, the Tishman daily reports for the Riverside project, and the surveillance video footage of the accident. Miller observed that the steel ladder fell from a height and struck plaintiff. He further noted that no devices were being used to restrain or hold the ladder in its hanging position such as braces, slings, hangers or any other devices to give proper protection to any worker within the vicinity of the hoist. It is his opinion, based on a certain degree of

[1] Inasmuch as plaintiff's counsel's affirmation and Miller's affidavit stated that Miller's curriculum vitae was annexed, its absence was a mere mistake and omission that was remedied on reply (CPLR 2001). The later submission did not constitute a belated attempt to cure deficiencies in the prima facie case by raising new facts and arguments on reply, like if the Miller affidavit was first provided on reply (*cf. Migdol v City of New York*, 291 Ad2d 201 [1st Dept 2002]).

professional certainty that the defendants had violated Labor Law §240(1) by and that plaintiff's injuries were caused when he was struck with the improperly secured ladder.

Labor Law §240(1) directs that, "[a]ll 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 caused 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 . . . as to give proper protection to a person so employed" (Labor Law §240[1]). Building owners and contractors who fail to abide by this statute are subject to the imposition of absolute liability (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]).

Whether a plaintiff will be able to recover pursuant to Labor Law §240(1) depends on whether the cause of the accident is the kind of gravity-related hazard that the statute accounts for (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509 [1991]). "The reach of Labor Law §240(1) is 'limited to such specific gravity-related accidents as [a worker] falling from a height or being struck by a falling object that was improperly hoisted on inadequately secured'" (*Wilinski*, 18 NY3d at 7, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

For an accident to be gravity-related, it is not required that the object fell from a great height. There is no "categorical exclusion of injuries caused by falling objects that, at the time of the accident, were on the same level as the plaintiff" (*Wilinski*, 18 NY3d at 9). Nor is liability limited to only circumstances where the falling object was in the process of being hoisted or secured (*id.*; *see Outar v City of New York*, 5 NY3d 731 [2005]; *Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757 [2008]). "'The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a

physically significant elevation differential'" (*Wilinski*, 18 NY3d at 10, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]).

As a result, if the elevation differential is de minimis then liability under Labor Law §240(1) will not apply. However, an object of sufficient weight, even traveling a short distance, can generate enough force such that the elevation differential could not be deemed to be de minimis (*id.*). In *Wilinski*, the Court held that elevation differential could not be deemed de minimis where metal pipes standing 10 feet tall fell at least four feet forward and struck the five foot, eight inch plaintiff (18 NY3d at 10; *see also Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686 [1st Dept 2017][cannot be said to be a de minimis elevation risk when a lighting bar, weighing approximately 20 to 30 lbs. and located 8 feet above ground, falls atop a six foot, eight inch plaintiff when considering the force of gravity]).

Furthermore, in order to recover pursuant to Labor Law §240(1), it must be demonstrated that the falling object required securing. This analysis depends on whether the lack of securing presents "a foreseeable elevation risk in light of the work being undertaken" (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263 [1st Dept 2007]). In *Quattrocchi*, where the falling planks of a makeshift shelf used to install air conditioning fell on carpenters below, the question was whether the planks were adequately secured, not whether the planks required securing (11 NY3d 757). Similarly, in *Rutkowski*, the lighting bar required securing since there was a foreseeable risk that as it was being removed by the electricians that it may fall on the carpenters working below (146 AD3d 686).

Here, it is undisputed that the defendants are the owner and general contractor and that the plaintiff was a protected worker for the purposes of Labor Law §240(1). Moreover, the 6-foot, 1-inch plaintiff was struck on the head by the 8 or 9 foot, 40 to 50 lb. steel ladder that fell vertically

from the wall, at the routinely trafficked loading dock area where workers wait for elevator hoists. Given the weight of the ladder and the force generated by the effects of gravity, the elevation differential cannot be said to have been de minimis, even accepting defendant's perspective that the plaintiff was closer to the ladder than 3 feet. Similarly, it is immaterial whether the steel ladder was hanging from right angles or leaning against the wall, as in either event there was a foreseeable falling object risk to the workers in the area if the ladder was maintained vertically and not secured. Even Holitzer agreed that the ladder presented an unsafe condition that could not stand. Plaintiff's expert Miller mentions braces, slings, hangers, among other things, that should have been used to secure the ladder if it were to be maintained vertically at that wall. It is evident that plaintiff's injury was proximately caused by the failure to adequately secure the ladder and prevent the foreseeable gravity related risk.

Accordingly, plaintiff's motion for summary judgment on its Labor Law §240(1) is granted.

Plaintiff shall serve a copy of this order on defendants, together with notice of entry, within 30 days of the date this order is uploaded onto NYSCEF.

This constitutes the decision and order of the Court.

2/24/2021
DATE

RICHARD G. LATIN, J.S.C.

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