SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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ARLEY HIGUITA, SANDRA HIGUITA,

Plaintiffs,

- v -

CAULDWELL WINGATE COMPANY, LLC, 40-56 TENTH OWNER LLC, FSG ELECTRIC, INC.,

Defendants.

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INDEX NO. 157191/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20-36 were read on this motion for partial summary judgment.

Plaintiffs move pursuant to CPLR 3212 for an order granting them partial summary judgment on the issue of liability against 40-56 Tenth Owner, LLC (owner) on the issue of liability, with respect to the third cause of action pursuant to Labor Law § 240(1) and fifth cause of action pursuant to Labor Law § 241(6). All defendants oppose.

I. AMENDED COMPLAINT (NYSCEF 23)

On April 10, 2019, plaintiff Arley Higuita was an employee of nonparty Phoenix Fire and Security Solutions, LLC when, while working on a construction project on the 10th floor of 40 Tenth Avenue in Manhattan, he fell from a ladder and injured himself. He advances causes of action under Labor Law §§ 200, 240(1), and 241(6).

II. PLAINTIFF'S AFFIDAVIT (NYSCEF 22)

By affidavit dated September 17, 2020, plaintiff alleges that the ladder from which he fell was a 16-foot extension ladder. He explains that the accident happened when he stood on the

ladder with his feet at a height of 12 to 13 feet from the ground, that the ladder "slipped and twisted out from under [him]," and that as he fell to the ground, he struck an electrical box.

According to plaintiff, he was asked that day to wire the security/camera system in a small utility closet on the 10th floor of the building. His helper was on the 11th floor running wire through a conduit that went through the floor and into the ceiling of the 10th floor. The ceiling in the closet was 18 feet high and plaintiff was provided with a 16-foot extension ladder to reach the area of the ceiling through which the wire was being pushed. Plaintiff stood the ladder on the floor of the closet near the wall closest to the area where he anticipated the wire to appear. As the ladder was going to be supported by the wall, he set its base approximately four feet from the wall.

After plaintiff set up the ladder, he climbed to the second or third rung from the top, and dared not climb higher. At that level, he was able to stretch and contort himself to reach the conduit but could barely reach the area where the wire was coming through. There was nothing in the utility closet for him to tie-off, with or without a harness, or to tie, secure or brace the ladder. Nor were any mechanical devices provided to him to secure the ladder either at the top or at the base and he was not provided with a co-worker to hold the base of the ladder.

As plaintiff reached for the conduit and the wire within it, the ladder slipped backward and sideways, and then twisted and fell from under him toward the wall, causing him to fall from the ladder, approximately 12 to 13 feet to the ground. As he fell, his body struck an electrical box affixed to the wall. Nobody else was in the closet at the time of plaintiff's fall, and no one witnessed the accident. As a result of his fall, plaintiff has undergone two surgeries.

III. CONTENTIONS

A. Plaintiffs (NYSCEF 20-27)

Plaintiffs argue that the undisputed facts as set forth by Arley in his affidavit demonstrate that owner's failure to provide him with a ladder of appropriate height, with equipment or personnel to secure the ladder as or a location for him to tie-off with his safety line, thereby clearly proving a violation of Labor Law § 240(1) and of § 241(6) in that a violation of Industrial Code § 23-1.21(b)(4)(iv) was also demonstrated, and that such violations proximately caused plaintiff's accident.

That depositions have not been held in this case is no bar to awarding judgment, plaintiffs contend, as no one other than Arley witnessed the accident and thus, there is no evidence contradicting his version of the accident. Moreover, they allege, the accident reports and photographs corroborate Arley's statements.

B. Defendants (NYSCEF 30-34)

Defendants oppose on the grounds that discovery is incomplete, that there exist questions of fact as to the issue of sole proximate cause, and that the motion is based on "an inaccurate factual predicate." They claim that as the sole theory of liability against owner is statutory and that the same claims are advanced against the other defendants, the only way to defend or disprove plaintiff's claims is through the testimony of the plaintiff and nonparty discovery that has not been conducted.

In support of their assertion that discovery is needed, and based on the answer to question D.9. of the Employer's Report of Work-Related Injury/Illness ("Did anyone see the injury/illness happen?"), to which plaintiff's employer had answered "yes" and identified plaintiff's helper (NYSCEF 27 at 21-23), defendants claim entitlement to depose the helper before the dispositive

motion may be addressed. They also state a need to depose plaintiff's supervisor as a "notice witness," based on plaintiffs' disclosure that a project manager for Arley's employer "was aware that a proper ladder was not being utilized for the task [Arley] was working on at the time he was injured." (NYSCEF 33).

Additionally, defendants maintain that plaintiff's explanation of how his accident occurred "calls in to question whether there was anything fundamentally wrong with the ladder as opposed to the plaintiff intentionally misusing it." Absent any indication from plaintiff that the ladder was defective, they argue, his apparent difficulty in using it raises triable issues of fact as to whether he misused it and whether such misuse was the sole proximate cause of the accident. They observe that plaintiff fails to address what instructions he was given in performing the assigned task, whether other ladders were available for his use, whether he refused to use another one, whether he was directed to use other devices in connection with his work or whether a coworker was available to hold the ladder, which raise issues as to whether plaintiff was the sole proximate cause of his injury or was recalcitrant.

Defendants also complain that whereas counsel claims that the ladder was too short and that the failure to have a taller ladder or personnel to secure it violates Labor Law § 240(1), plaintiff does not, *in haec verba*, state in his affidavit that the ladder was too short, and that his claim that his ladder was not secured or tied-off is not supported by an explanation as to whether there had been any discussion of it, alleging that "[i]t is entirely possible, that the plaintiff was instructed to takes [sic] these measures but disregarded same. . . ."

And, according to defendants, Industrial Code § 23-1.21 (b)(4) is not applicable as it applies to "leaning ladders," and plaintiff alleges that he used an extension ladder.

C. Plaintiffs' reply (NYSCEF 35-36)

By affidavit dated October 27, 2020, plaintiff reiterates that he was provided with a 16-foot extension ladder to use in reaching the area in the ceiling through which the wire was being pushed through the conduit from the 11th floor. He alleges that there was no taller ladder at the site nor was any other device available that would permit him to access the area of the ceiling, and that no representative from defendants or from Phoenix directed him not to use the ladder. He also asserts that an extension ladder is one which must be "leaned against a wall in order to climb it," and that an extension ladder used in this manner is also referred to as a leaning ladder. He again maintains that no one else was in the utility closet at the time of his fall, that there were no eyewitnesses to the accident, and that his helper was on the 11th floor from which vantage he could not have seen the incident.

IV. DISCUSSION

A. Governing laws

Pursuant to Labor Law § 240(1):

> All contractors and owners and their agents, . . . in the erection, demolition, repair, 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, hangars, 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.

This statute "was designed to prevent those types of accidents in which, *inter alia*, the 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." (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], *quoting Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Naughton v City of New York*, 94 AD3d 1, 8 [1st Dept 2012]). The statute imposes a "'flat and unvarying' duty upon the owner and contractor despite any

contributing culpability on the part of the worker" (*Bland v Manocherian*, 66 NY2d 452, 461 [1985]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 49 [1st Dept 2005]), even if they exercise no supervision or control over the work performed (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 287 [2003]), and it is liberally construed (*Koenig v Patrick Constr. Corp.*, 298 NY 313, 319 [1948]; *Quigley v Thatcher*, 207 NY 66, 68 [1912]).

Liability under Labor Law § 240(1) requires, *inter alia*, a showing that safety equipment was provided but was defective. (*See Ortiz v Varsity Holdings, LLC*, 18 NY3d 335 [2011] [to prevail on summary judgment, plaintiff must establish existence of safety device of kind enumerated in statute that could have prevented fall]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001] [liability contingent on existence of hazard contemplated in section 240(1) and failure to use, or inadequacy of, safety device of kind enumerated therein]).

The inexplicable shifting of an unsecured ladder may alone support a statutory violation if a worker is caused to fall due to such shifting (*see e.g. Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524 [1st Dept 2014]; *Picano v Rockefeller Ctr. N.. Inc.*, 68 AD3d 425 [1st Dept 2009]; *Carchipulla v 6661 Broadway Partners, LLC*, 95 AD3d 573, 574 [1st Dept 2012]).

Even if a proper ladder is provided, when a plaintiff alleges that he incorrectly placed the ladder and that the improper placement was the proximate cause of his injury, liability must be found against the owner. Any safety device that is provided must be properly placed and secured. (*See Klein v City of New York*, 89 NY2d 833 [1996]). Where the device fails to perform as intended, liability is established as a matter of law (*see Felker v Corning*, 90 NY2d 219 [1997]; *Montalvo v J. Petrocelli Constr.*, 8 AD3d 173 [1st Dept 2004]). Once the plaintiff has set forth a *prima facie* case entitling him to summary judgment, the burden then shifts to the defendant to

establish that adequate safety devices were provided to plaintiff and that plaintiff was the sole proximate cause of his accident (*Rom v Eurostruct*, 158 AD3d 570 [1st Dept 2018]).

Pursuant to Labor Law § 241(6), owners and contractors bear a non-delegable duty to provide workers with reasonable and adequate protection and safety. To establish a violation of this section, a plaintiff must show that the defendant violated a regulation setting forth a specific standard of conduct. Given this duty, a plaintiff need not establish that the owner or contractor or their agent had notice of the alleged violation or caused or created it by exercising supervision and control over the injury-producing work. (*See Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343 [1998] [general contractor may be held liable despite absence of control over worksite or notice of violation]; *Rubino v 330 Madison Co., LLC*, 150 AD3d 603 [1st Dept 2017] [owner and/or general contractor's lack of notice irrelevant to liability]; *Gonzalez v Perkan Concrete Corp.*, 110 AD3d 955 [2d Dept 2013] [plaintiff need not show that defendants exercised supervision and control over work or worksite]). In addition to demonstrating the violation of such a regulation, the plaintiff must show that the alleged injuries were proximately caused by that violation. (*Ulrich v Motor Parkway Properties, LLC*, 84 AD3d 1221, 1223 [2d Dept 2011]; *Egan v Monadnock Const., Inc.*, 43 AD3d 692, 694 [1st Dept 2007], *lv denied* 10 NY3d 706 [2008]).

Pursuant to the pertinent portion of Industrial Code § 23-1.21(b)(4)(iv), "[w]hen 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." An extension ladder leaning against a wall falls within the ambit of section 23-1.21(b)(4)(iv). (*Melchor v Singh*, 90 AD3d 866, 870–71 [2d Dept 2011]).

B. Analysis

There is no dispute that defendant 40-56 Tenth Owner, LLC is the owner of the property where plaintiff's accident occurred, and that absent any articulated argument that plaintiffs have not set forth a *prima facie* violation of Labor Law §§ 240(1) and 241(6), it is incumbent on defendants to raise a factual issue for trial. In lieu thereof, they must offer a nonspeculative reason to believe that discovery will yield information supporting defendants' position. (*See Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988] ["'conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' to defeat summary judgment"]).

Here, the allegation that plaintiff's helper has such information arises solely from the form filled out by plaintiff's employer which was not prepared by plaintiff nor is he alleged to have assisted in its preparation. Consequently, it is inadmissible against him and thus provides an insufficient basis for rejecting plaintiff's consistent assertions that his helper was located on the floor above him when the accident occurred, and thus, could not have seen the accident as it occurred.

The remainder of defendants' contentions likewise provide an insufficient basis on which to deny plaintiff's motion based on CPLR 3212(f), absent any allegation beyond speculation that plaintiffs are in possession of evidence supporting a claim that plaintiff was the sole proximate cause of his accident or that he was recalcitrant. (*See Erkan v McDonald's Corp.*, 146 AD3d 466, 467 [1st Dept 2017] [although plaintiff not yet deposed, defendants not entitled to further discovery as "they failed to identify what information is in the exclusive control of plaintiff"]). Rather, plaintiff provided a detailed explanation of how the accident occurred and pursuant to the authority set forth *supra*, his explanation is sufficient to demonstrate, *prima facie,* that owner

violated each statute, and defendants raise no factual issue.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion for an order granting them partial summary judgment on the third and fifth causes of action as against defendant 40-56 Tenth Owner LLC is granted; and it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their preliminary conference on or before April 14, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on April 14, 2021 at 2:15 pm or virtually, if necessary.

3/1/2021
DATE

BARBARA JAFFE, 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