At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of APRIL, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

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AKMAL AKHMEDJANOV,

Plaintiff,

-against-

Index No.: 520085/2018
Decision and Order

PURVES STREET OWNERS LLC, PURVES STREET DEVELOPMENT LLC and PURVES DEVELOPMENT LLC,

Defendants,

----------X

The following *papers NYSCEF* Doc #'s 62 to 79 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	62-76
Opposing Affidavits (Affirmations)	78
Reply Affidavits (Affirmations)	79

After having heard Oral Argument on JANUARY 28, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves pursuant to CPLR 3212 for summary judgment on the causes of action pursuant to Labor Law 240(1) and 241(6) under Industrial Codes 23-3.3(c) and 23-3.3(g). (MS#3). Defendants oppose the same.

FACTS

This action arises from personal injuries sustained by Plaintiff, AKMAL AKHMEDJANOV, when, during the course of hand demolition of a wall, undertaken by

other workers and in an unsecured zone, a falling piece of concrete impacted his right leg while he was walking to his work area. As a result of this accident. Plaintiff sustained injuries to his back and right knee requiring surgery.

It is undisputed that at the time of the accident, Plaintiff was working as a window installer for Walsh Glass Metal LLC- a subcontractor hired to install exterior windows at the property owned by Defendants (NYSCEF Doc. No 69, at 15: 6-13). On the day of the accident, December 13, 2016, Plaintiff testified he was in an area that was to be the main lobby of the building, preparing to cut metal window framing (*Id*., at 28-29). Plaintiff was wearing a hard hat, goggles, vest and protective boots (*Id.*, at 22, 24). Plaintiff was not warned to avoid the demolition zone prior to the accident (*Id*., at 36:4-6). Plaintiff was working on the other side of the wall being demolished. (*Id*., at 36:12-15). Just prior to the accident, Plaintiff had plugged in an extension cord 15 meters from his work area (*Id*., at 31). As Plaintiff was walking back to his work area from plugging in the outlet, he was struck by falling debris (*Id*., at 35:7-13). Specifically, plaintiff was struck by concrete blocks that fell from an interior wall that was being demolished (*Id*., at 36:16--37:5). Plaintiff testified he was unaware that the wall was being demolished before he went to plug in the extension cord (*Id*., at 37:13-15). The area around the wall being demolished was not cordoned off or marked with caution tape, nor were there warnings of any kind (*Id*. at 37:16-38:2)(*See also NYSCEF Doc No*. 72 Surveillance Video). Plaintiff was struck by a block that hit the ground and his right leg, at or about the knee (*Id*., at 40:1-44:3). Additionally, there is video footage of the accident that has been authenticated by defendants witness in the course of his EBT testimony (see NYSCEF Doc. No 71; *NYSCEF Doc No*. 72). Said testimony while watching the video of the

accident states there is demolition going on at the time of the accident (See NYSCEF Doc No. 71 at pp. 35:12-22) The testimony goes on to establish the wall in question is an interior wall not an exterior wall (See NYSCEF Doc. No 71 pp. 38; 2-25). It is undisputed, at the time of the accident, the area surrounding the demolition site was visibly not secured; workers were walking back and forth around and underneath the demolition zone; there are no ropes, netting, borders, caution signs or any other materials cornering off the demolition zone.

ARGUMENTS

Plaintiff contends they are entitled to summary judgment on their Labor Law 240(1) cause of action because courts in New York have repeatedly held "when a construction worker is hit by a falling object during demolition and such objects are not secured the worker will be entitled to summary judgment". Plaintiff also contends they are entitled to summary judgment on their Labor Law 241(6) claims because there is no issue of fact as to the three alleged violations of Industrial codes 12 NYCRR 23-3.3(c) 23-3.3(g) establishing a violation of Labor Law 241(6).

Defendants, in opposition contend summary judgment on the Labor Law 240(1) claims must be denied because (1) there are questions of fact as to whether labor law applies to the work that was being performed and (2) there are questions of fact as to whether the cinderblock from the wall was an object that required securing for purposes of the work. Defendant further contend plaintiff's request for summary judgment on his 241(6) claim should be denied because there are questions of fact as to whether the Industrial Code provisions were violated and whether they would apply to the work in question.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id*. Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957].) The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield,* 21 A.D.2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York,* 49 NY2nd 557 [1990].) Once this burden is met, the burden shifts to the opposing party to

submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v.Algaze,* 84 NY2d 1019 [1995]).

Labor Law § 240(1)

Labor Law 240(1) provides:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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."

Defendants contend that there are questions of fact as to whether labor law applies to work being performed. This court disagrees.

"Liability under Labor Law 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against". (*Salazar v. Novalex Contracting Corp.,* 18 NY3d 134, 139 [2011].) " 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.*" (*Runner v. New York Stock Exchange,* 13 NY3d 599, 604 [2009] *[quoting Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 NY2d 494, 501 (1993)].) In determining the applicability of the statute, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to the object." (*See Runner v.*

New York Stock Exchange, 13 NY3d at 604.) "The dispositive inquiry ... does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker." (*Runner v. New York Stock Exchange,* 13 NY3d at 603.) "Rather, 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." (*Id.*)

"The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk." (*See Runner v. New York Stock Exchange,* 13 NY3d at 603; *see also Davis v. Wyeth Pharmaceuticals, Inc.,* 86 AD3d 907, 909 [3d Dept 2011].) To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Berg v. Albany Ladder Co.,* 10 N.Y.3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC,* 80 AD3d 734, 735, 915 NYS2d 620). "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v. Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; *see Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.,* 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

In *Oakes v. Wal–Mart Real Estate Business Trust* (99 AD3d at 39), the Third Department in discussing the Court of Appeal's decision in *Willinski v. 334 E. 92nd*

Street Hous. Dev. Fund Corp. (18 NY3d at 10), explained that, even though the Court of Appeals has rejected a "same level rule" that automatically precludes liability "where the base of a falling object ... and the injured worker are on the same level" (*see Oakes v. Wal–Mart Real Estate Business Trust,* 99 AD3d at 38), the Court of Appeals has not abandoned the requirement that there be a physically significant height differential between the plaintiff and the object in order to establish liability under Labor Law § 240(1). Indeed, as noted by the Third Department in *Oakes,* the Court of Appeals determined in *Willinski* that there was a four-foot differential between the Plaintiff and the pipes that fell on him, and that such differential was physically significant. *Oakes v. Wal–Mart Real Estate Business Trust* (99 AD3d at 39).

In *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.* (84 N.Y.2d 841, 844 [1994]), the Court of Appeals held that a worker "placing a 120–pound beam onto the ground from seven inches above his head with the assistance of three other co-workers ... was not faced with the special elevation risks contemplated by the statute." Although *Rodriguez* preceded both *Runner* and *Willinski,* it was recently cited by the Court of Appeals in *Ortiz v. Varsity Holdings, LLC* (18 NY3d 335 [2011]) for the proposition that "[i]t is true that courts must take into account the practical differences between the usual and ordinary dangers of a construction site, and ... the extraordinary elevation risks envisioned by Labor Law § 240(1)' " (*see id*. at 339 [quoting *Rodriguez v. Margaret Tietz Center for Nursing Care, Inc.,* 84 N.Y.2d at 843)]; *see also Oakes v. Wal–Mart Real Estate Business Trust,* 99 AD3d at 39.)].

In the present case, it is clear and undisputed that while at work on a construction site plaintiff was struck by concrete blocks that fell from an interior wall

being demolished, that went to the ceiling of what was to be a lobby and the plaintiff was working at two levels below where the lobby would be, thereby making the wall above the plaintiff. The descriptions of how the accident occurred as well as the video of the accident occurring establish the proximate cause of plaintiff's injury was a "physically significant" elevation differential between the object that fell and Plaintiff. In the present case, it is clear that the concrete blocks from the wall being demolished which could and actually did fall onto a person working below is the type of risk that the Labor Law was enacted to protect from. Accordingly, plaintiff's, motion for summary judgment on the issue of liability as to Plaintiffs' Labor Law § 240(1) cause of action is Granted.

Labor Law 241(6)

"**Labor Law 241(6)** imposes a nondelegable duty of reasonable care upon an owner or general contractor to provide reasonable and adequate protection to workers, and a violation of an explicit and concrete provision of the Industrial Code by a participant in the construction project constitutes some evidence of negligence for which the owner or general contractor may be held vicariously liable ." (*Fusca v. A & S Construction,* LLC, 84 AD3d 1155, 1156 [2d Dept 2011]).

Plaintiff contends defendants violated Industrial Code Section 23-3.3(c). Section 23-3.3(c) provides:

> "(c) Inspection. During hand demolition operations, continuing inspections shall be made by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material. Persons shall not be suffered or permitted to work where such hazards exist until protection has been provided by shoring, bracing or other effective means." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-3.3.

In the present case because the concrete blocks from the wall fell, and nothing was

done to guard, shore, or brace it prior to the collapse and there is no evidence of any inspections at all were made the plaintiff has met his burden for summary judgment under this code violation. Plaintiff has established that there were not inspections made and in opposition the defendants fail to raise a triable issue of fact showing that inspections were conducted. Accordingly, the branch of plaintiff's, motion for summary judgment of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR 23-3.3(c) is hereby granted.

Plaintiff contends defendants violated Industrial Code Section 23-3.3(g). Section 23-3.3(g) provides:

> "Demolition of walls and partitions. (3) Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-3.3. **(g)** Protection in other areas. Every floor or equivalent area within the building or other structure that is subjected to the hazard of falling debris or materials from above shall be boarded up to prevent the passage of any person through such area, or shall be fenced off by a substantial safety railing constructed and installed in compliance with this Part (rule) and placed not less than 20 feet from the perimeter of such floor opening or such area shall be provided with overhead protection in the form of tight planking or at least two inches thick full size, exterior grade plywood at least three-quarters inch think or material of equivalent strength." N.Y. Comp. Codes R. & Regs. tit. 12, § 23-3.3 (g)

In the present case, plaintiff contends the wall being demolished was unguarded in such condition that it may fall. Defendants in the present case have failed to raise an issue of fact regarding this industrial code violation. Accordingly, the branch of plaintiff's, motion for summary judgment of Plaintiffs' Labor Law §241(6) cause of action premised upon the violation of 12 NYCRR 23-3.3(g) is hereby granted.

Accordingly, plaintiff's, motion for summary judgment on the issue of liability as to Plaintiffs' Labor Law § 240(1) cause of action is Granted. Plaintiff's motion for summary

judgment as to their Labor Law §241(6) cause of action premised upon the violations of 241(6) under Industrial Codes 12 NYCRR 23-3.3(c); 23-3.3(g) are hereby Granted, for the reasons stated above. (MS#3).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
April 6, 2021

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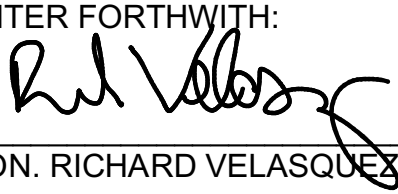

HON. RICHARD VELASQUEZ