SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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JOAO CIPRIANO,

Plaintiff,

- v -

STRUCTURETECH NEW YORK, INC.,70TH STREET LLC.

Defendant.

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INDEX NO. 150933/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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, 72, 73, 74, 75, 76, 77, 78, 79

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

In this Labor Law action, Plaintiff Joao Cipriano alleges that he was struck by a section of metal scaffolding when it fell down a stairwell shaft due to the negligence of Defendant Structuretech New York, Inc ("Structuretech"). In motion sequence 003, Plaintiff moves for summary judgment on the issue of liability. Defendant opposes the motion and cross-moves to dismiss Plaintiff's claims under the Labor Law.

Background

Plaintiff alleges that he was employed as a supervisor by non-party Sweeney & Conroy, Inc. ("Sweeney") when it was retained by former Defendant New York 70th Street, LLC[1] to perform construction work at the premises located at 19 East 70th Street. (NYSCEF Doc No. 1, Complaint, at ¶¶ 16-34.) Sweeney served as the general contractor on the construction project and

[1] Defendant New York 70th Street LLC was dismissed from this action via decision and order dated May 14, 2020. (NYSCEF Doc No. 40.)

hired Structuretech as a subcontractor (*id.* at ¶¶ 17-24) to perform scaffolding work and concrete shoring. (NYSCEF Doc No. 45, Pl.'s Aff., at ¶ 2.)

Plaintiff alleges that on July 24, 2018, while he was standing next to a stairway shaft on the building's second floor, Structuretech employees were lowering sections of scaffolding down the shaft from the fifth to the first floor via an electric hoist when some sections fell and struck him in the head, rendering him unconscious and causing him serious injuries. (Pl.'s Aff. at ¶¶ 3-5; *see also* NYSCEF Doc No. 51, Photos.) Plaintiff commenced this action on January 28, 2019 with the filing of the summons and complaint, setting forth causes of action against Structuretech for common law negligence and a violation of Labor Law § 200. (Complaint at ¶¶ 1-44.) In his bill of particulars, Plaintiff also claimed that Structuretech had also violated Labor Law §§ 240[1] and 241[6]. (NYSCEF Doc No. 49 at ¶ 4.)

Plaintiff moves for summary judgment on the issue of liability, and, in support, submits his own affidavit, a video allegedly depicting the accident (NYSCEF Doc No. 46, Video); three accident reports from Structuretech employees (NYSCEF Doc No. 47, Daniel Casteneda Report at 2-4, Angel Fabricio Chacha Report at 5-7; NYSCEF Doc No. 53, Johnny Garcia Report); a Sweeney accident report (NYSCEF Doc No. 54, Sweeney Report); an NYC Department of Buildings record showing that a penalty against Sweeney was issued after the accident (NYSCEF Doc No. 55, DOB Report); and an prehospital care report summary. (NYSCEF Doc No. 56.) Plaintiff argues that this evidence is indisputable and entitles him to summary judgment on liability under any of the following theories: common-law negligence, res ipsa loquitor, a violation of Labor Law § 240[1], or a violation of Labor Law § 200. (NYSCEF Doc No. 44, Pl.'s Memo., at ¶ 6.)

In opposition, Structuretech argues that it has not had an opportunity to view the video and that Plaintiff's evidentiary documents are hearsay and thus inadmissible. (NYSCEF Doc No. 61, Opposition, at ¶¶ 3-5.) Structuretech also argues that the motion is premature because no substantive discovery has taken place to address certain outstanding questions of fact, including, inter alia, whether Plaintiff was comparatively negligent in "standing too close to the stairway," and whether Sweeney was negligent in directing Structuretech's actions. (*Id.* at 12.)

In addition, Structuretech cross-moves to dismiss Plaintiff's claims under Labor Law §§ 200, 240, and 241[6], on the grounds that Structuretech was a mere subcontractor with no supervisory control over any construction work, and that Sweeney, as the general contractor, was responsible for supervising and ensuring site safety. (NYSCEF Doc No. 64, Cross-motion, at ¶ 5-6.) In support, Structuretech submits the contract between it and Sweeney, which contains a "Project Safety Program" developed by Sweeney (*id.* at ¶¶ 7-9; NYSCEF Doc No. 69, Contract), and the affidavit of William Hunt, a safety director of Structuretech, who avers that Structuretech had no responsibility for overall job safety and did not provide, own, or install the hoist at issue in this case. (NYSCEF Doc No. 62, Hunt Affidavit.)

Discussion

It is well settled that "'the proponent of a summary judgment motion 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'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], *rearg denied* 10 NY3d 885 [2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat a motion for summary judgment, the opposing party must "show facts sufficient

to require a trial of any issue of fact" (CPLR 3212 [b]), by "producing evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Preliminarily, the court notes that "Plaintiff has no opposition to the dismissal of his cause of action pursuant to Labor Law § 241(6)" (NYSCEF Doc No. 74, Reply at ¶ 37), and as such that cause of action is dismissed.

Admissibility of Plaintiff's Evidence

The court finds that Plaintiff has failed to properly authenticate the surveillance video. "A video recording may be authenticated by the testimony of a witness to the recorded events or of an operator or installer of the equipment that the video recording accurately represents the subject matter depicted." (*Rodriguez v JHL Restaurants of Seventh Ave.*, LLC, 2016 WL 4506727, at *2 [Sup Ct, NY County 2016] [*citing Read v Ellenville Nat'l Bank*, 20 AD3d 408 [2d Dept 2005].) Here, Plaintiff's affidavit states that Plaintiff "obtained copies of the videos showing the accident . . . [and] watched the videos, including the one which shows [him] getting struck in the head[.]" (Pl.'s Affidavit at ¶ 6.) However, Plaintiff's statement is insufficient, as he fails to unequivocally assert that the video fairly and accurately depicted the accident. (*Henry v Buffamante*, 2020 WL 5247098, at *1 [Sup Ct, NY County, July 31, 2020].) Further, Plaintiff actually states that he did not personally see the accident, in that he "tried to turn and look" after hearing noises, but was then struck in the head and rendered unconscious. (Pl.'s Affidavit at ¶ 5.) Although Plaintiff states that after viewing the video and "speaking to various people at the site, [he] learned exactly how and why the accident happened," such statements are inadmissible hearsay. (*Najera v Bernsohn & Fetner, LLC*, 2021 WL 126338, at *5 [Sup Ct, NY County, Jan 12, 2021].) As such, the video is inadmissible, as are the video stills submitted by Plaintiff alongside his reply brief. (Reply at ¶19; NYSCEF Doc No. 76, Stills.)

Next, Structuretech argues that Plaintiff fails to establish that the prehospital summary is admissible under the business records exemption (Opposition at ¶¶ 6-7); that Plaintiff fails to establish that the Sweeney report was prepared by Sweeney in the ordinary course of business, that it was Sweeney's regular business practice to prepare such reports, and that the persons providing the information therein were under a business duty to do so (*id.* at ¶ 10); and that Plaintiff fails to authenticate the DOB Report by stating that the information therein was derived from a person with firsthand knowledge of its contents and prepared under a business duty. (*Id.* at ¶ 11.)

In reply, Plaintiff concedes that the prehospital summary, the Sweeney Report, and the DOB Report are "arguably hearsay" but states that they are "just superfluous anyway". As such, the court will not consider these submissions.

Plaintiff principally relies upon the three Structuretech reports, provided to Plaintiff pursuant to Structuretech's response to a notice to admit (Pl.'s Memo at ¶¶ 13-14), the admissibility thereof Structuretech does not object to. However, the court finds that two of these reports are inadmissible for failure to comply with CPLR 2101[b], which requires that "[w]here an … exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate."

Here, the Casteneda Report and the Chacha Report (both submitted as NYSCEF Doc No. 47) were both completed by an individual with the first name of Jonathan, although the last name is illegible. Jonathan apparently took the statements of Casteneda and Chacha, which were provided in Spanish, and translated them to English. (*See id.* at 3, 6.) However, Plaintiff, as the proponent of the evidence, is obligated to show that "the translation was provided by a competent, objective interpreter whose translation was accurate, a fact generally established by calling the

translator to the stand." (*Nava-Juarez v Mosholu FIeldston Realty, LLC*, 167 AD3d 511, 512 [1st Dept 2018].) Because Plaintiff fails to submit the required affidavit from Jonathan stating that the translation is accurate, these exhibits are inadmissible. (*Castro v Gassambe*, 2021 WL 2696988, at *2 [Sup Ct, NY County, May 6, 2021].)

Labor Law §§ 240(1)

Labor Law § 240(1), often called the Scaffold Law, provides that:

> 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.

"Labor Law § 240(1) was designed to prevent those types of accidents in which the ... hoist ... 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].) However, "for section 240(1) to apply, a plaintiff must show more than simply that an object fell causing injury to a worker. A plaintiff must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute." (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 268 [2001].) Further, a plaintiff must also show that at the time of injury, "he was performing work necessary and incidental to the erection or repair of a building or structure." (*Shields v St. Marks Housing Assocs., L.P.*, 230 AD2d 903, 904 [2d Dept 1996].)

The provision "places ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractors." (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981].) "Although [Labor Law] sections 240 and 241 now make nondelegable the duty of an owner or general contractor to conform to the

requirement of those sections, the duties themselves may in fact be delegated." (*Id.* at 317–18 [internal citations omitted].) A third-party, such as a subcontractor, may be found liable as an "agent" of an owner or general contractor "[o]nly upon obtaining the authority to supervise and control" "the work giving rise to the duties imposed under Labor Law § 240[.]" (*Bjelicic v Lynned Realty Corp.*, 152 AD2d 151, 154 [1st Dept 1989].)

Here, Plaintiff fails to demonstrate entitlement to partial summary judgment on the issue of Structuretech's liability pursuant Labor Law § 240[1]. Plaintiff has submitted no admissible evidence demonstrating that he was struck by a falling object, that Structuretech was responsible for the falling object, or that Structuretech exercised the requisite level of supervision and control over the work being performed to render it the statutory agent of Sweeney.

In opposition to Plaintiff's motion and in support of its cross motion, Structuretech argues that Plaintiff's claim must be dismissed, as the contract between the parties demonstrates that Plaintiff's employer, Sweeney, had absolute authority and control over both the work being done and overall safety on the site, rather than Structuretech. (Cross-motion at ¶¶ 5-14.) It is undisputed that Plaintiff was working for Sweeney as a supervisor at the time of his injury. Pursuant to Sweeney's Project Safety Program, contained within the contract between the parties, the supervisor was responsible for implementing the safety program, providing training to subcontractors, and making visual inspections of work areas prior to the start of work each day. (Contract at 24-25.) All persons on site were to report unsafe conditions or equipment to the site supervisor, who had the power to stop work until corrections were made. (*Id.* at 25, 27.)

However, while these enumerated contractual duties "are not in themselves sufficient" for the court to determine that Sweeney, rather than Structuretech, held all authority and control over the work being done, "they do furnish cause to believe that further discovery may lead to evidence

that [Sweeney's] employees did exercise actual supervision or control over plaintiff's worksite." (*Ross*, 81 NY2d at 506 [1993].) In this regard, "it is noteworthy that" neither party has undergone depositions (*id.*), and on this record, the court cannot determine whether either of the parties held authority and control over the work as a matter of law. Thus, Structuretech's cross motion is likewise denied.

Labor Law § 200 and common-law negligence

Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work." (*Ortega v Puccia*, 57 AD3d 54, 60 [2d Dept 2008].) "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." (*Russin*, 54 NY2d at 317.)

Having already found that neither party has satisfied their burdens for summary judgment because an issue of fact remains regarding authority and control, both Plaintiff's motion and Structuretech's cross motion related to Labor Law § 200 are denied. (*See Serpe v Eyris Productions, Inc.*, 243 AD2d 375, 380 [1st Dept 1997] ["For the same reason, [contractor] may not be held liable under Labor Law § 200 … absent a demonstration of [contractor's] control, the Labor Law § 200 claim was also properly dismissed"].)

Likewise, Plaintiff's motion for summary judgment on the issue of Structuretech's liability on his claim for common-law negligence is denied because Plaintiff fails to produce admissible evidence demonstrating such entitlement. Thus, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment on the issue of Structuretech's liability is denied in full; and it is further

ORDERED that the branch of Structuretech's cross-motion for summary judgment seeking dismissal of Plaintiff's cause of action under Labor Law § 241[6] is granted; and it is further

ORDERED that the balance of Structuretech's cross-motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to meet and confer and submit a proposed Preliminary Conference Order to the court for signature via NYSCEF on or before December 20, 2021.

11/30/2021
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE