SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ERIKA EDWARDS** **PART 11**

Justice

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MIROSLAW CHROSTOWSKI,

Plaintiff,

- v -

120 BROADWAY, LLC, JRM CONSTRUCTION MANAGEMENT, LLC, RITE-WAY INTERNAL REMOVAL, INC. and SILVERSTEIN PROPERTIES, INC.,

Defendants.

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INDEX NO. 156081/2020

MOTION DATE 03/17/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

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

Upon the foregoing documents and oral argument held before this court on November 16, 2021, the court denies Plaintiff Miroslaw Chrostowski's ("Plaintiff") motion for partial summary judgment on liability as to its Labor Law § 240(1) claim and/or based upon res ipsa loquitur against Defendant 120 Broadway, LLC ("120 Broadway") and as to its Labor Law § 240(1) claim as against Defendant JRM Construction Management, LLC ("JRM").

Plaintiff brought this claim against Defendants 120 Broadway, JRM, Rite-way Internal Removal, Inc. ("Rite-way") and Silverstein Properties, Inc. ("Silverstein") (collectively "Defendants") for personal injuries he allegedly sustained on July 31, 2018 when a portion of the ceiling fell on him and two other workers, causing Plaintiff to be pinned on top of a shovel on the floor. At the time of the accident, Plaintiff was taking down a tent after he had performed asbestos removal work at the construction site for about 1 ½ weeks. Plaintiff alleged that 120 Broadway is the owner of the premises, JRM is the general contractor and Plaintiff was

employed by non-party ETS Contracting, Inc. which was a subcontractor responsible for removing asbestos. Plaintiff's claims include common law negligence, Labor Law §§ 200, 240(1) and 241.

Plaintiff now moves for partial summary as to liability against 120 Broadway as to his Labor Law § 240(1) claim and under res ipsa loquitur and against JRM as to his Labor Law § 240(1) claim. Plaintiff argues in substance that he is entitled to summary judgment in his favor as to these claims because, as the owner and general contractor, 120 Broadway and JRM have a non-delegable duty to provide adequate protection to Plaintiff, Plaintiff's accident was caused by an elevation-related risk for which 120 Broadway and JRM failed to provide adequate safety devices and the violation was the proximate cause of Plaintiff's injuries. Plaintiff further argues in substance that he is entitled to summary judgment under the doctrine of res ipsa loquitur as the ceiling collapsed on Plaintiff during construction demolition work and such ceiling was not braced or shored.

Defendant JRM opposes the portion of Plaintiff's motion seeking partial summary judgment as to liability on its Labor Law § 240(1) claim against JRM. JRM argues in substance that Plaintiff's motion is premature as there has been no discovery conducted in this matter. Since Plaintiff only relied upon his affidavit, summary judgment is inappropriate at this early stage of the litigation.

Defendants 120 Broadway and Silverstein oppose the motion and argue in substance that Labor Law § 240(1) does not apply to this case since the ceiling was a part of the building's permanent structure. They further argue in substance that there was no allegation that an object was being hoisted or secured, that something required securing for the purposes of the undertaking, that the ceiling fell because of the absence or inadequacy of a safety device of a

kind enumerated in the statute or that Plaintiff's injury was caused by a foreseeable risk. Additionally, they argue that the motion is premature as there has been no discovery and Plaintiff provided no evidence as to the cause of the ceiling collapse or that demolition was occurring on the premises in support of either of his claims.

A. Applicable Legal Analysis

a. Labor Law § 240(1)

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). An award of summary judgment is appropriate when no issues of fact exist (see CPLR 3212(b); *Sun Yan Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept 1984]).

Labor Law § 240(1) states that all contractors, 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]). Labor Law § 240(1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The purpose of the statute is to protect workers from elevation-related risks by placing the ultimate responsibility for construction safety practices on the owner and contractor and it is to be construed as liberally as necessary to accomplish that purpose (*id.*; *Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]).

To succeed under Labor Law § 240(1), a plaintiff must demonstrate that the statute was violated and that the violation was the proximate cause of his injury (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). A plaintiff must also demonstrate that the injury sustained is the type of elevation-related hazard to which the statute applies, that there was a failure to use, or an inadequacy of, a safety device of a kind set forth in the statute and that the fall or the application of an external force was a foreseeable risk of the task being performed (*see*

Narducci v Manhasset Bay Assoc., 96 NY2d 259, 267-268 [1st Dept 2001]; *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

Furthermore, defendants are liable for all normal and foreseeable consequences of their acts and to establish a prima facie case, a plaintiff is not required to demonstrate the precise way the accident occurred or that the injuries were foreseeable (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 562 [1993]). A plaintiff need only demonstrate that the risk of some injury from defendants' conduct was foreseeable (*id.*).

Additionally, the determination of the type of protective safety device required for a particular job depends on the foreseeable risks of harm presented by the nature of the work being performed (*Buckley*, 44 AD3d at 268). Proper protection means that the device must be appropriately placed or erected so that it would have safeguarded the employee and must itself be adequate to protect against the hazards entailed in the task assigned (*Felker v Corning Inc.*, 90 NY2d 219, 224 [1997]).

Courts must consider whether a plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]; *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015]). However, liability under the statute is contingent upon the existence of a hazard contemplated in § 240(1) and the absence or inadequacy of a safety device of the kind enumerated therein (*Narducci v Manhasset Bay Associates*, 96 NY2d 259, 267 [2001]). The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or the difference between the elevation

level where the worker is positioned and a higher level of the materials or load being hoisted or secured (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

b. Res Ipsa Loquitur

The doctrine of res ipsa loquitur applies the ordinary rules related to circumstantial evidence in negligence cases resulting from accidents having particular characteristics (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). "When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident upon the theory that certain occurrences contain within themselves a sufficient basis for an inference of negligence" (*id.* [internal citation and quotation marks omitted]).

To prevail on the theory of res ipsa loquitur, a plaintiff must establish the following three elements: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (internal citation and quotations omitted)" (*id.* [internal citation and quotation marks omitted]).

Summary judgment is warranted "only in the rarest of res ipsa loquitur cases" and "[t]hat would only happen when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]).

The First Department reversed a lower court's decision and denied Plaintiff's partial summary judgment motion as to liability in a ceiling collapse case caused by a burst sprinkler pipe, even with proof that defendant violated a city ordinance and that a defective condition existed on the premises, because the conclusion that defendant's negligence was the proximate

cause of the damage was not so inescapable as to warrant judgment as a matter of law (*Sunshine Corp. v Kinney System, Inc.*, 173 AD2d 293, 293-294 [1st Dept 1991]). The court stated that although it was true that cases involving ceiling collapses and water main breaks "have been held to be the sort of events suitable for res ipsa loquitur treatment, the question of whether the doctrine is applicable in a particular case is almost invariably of no moment except in the context of charging a jury" (*id.* at 294). "A burst water pipe, even though unexplained, is not the type of occurrence which, by itself and unattended by other exceptional circumstances, creates an inference of negligence so strong as to leave no serious doubt that it could have been avoided by the exercise of due care" (*id.* [internal citation and quotation marks omitted]).

B. Discussion

Here, the court denies Plaintiff's motion and finds that Plaintiff failed to demonstrate his entitlement to judgment in his favor as to liability against 120 Broadway or JRM as a matter of law as to his Labor Law § 240(1). Plaintiff failed to demonstrate that his injuries were caused by a falling object or an extraordinary elevation risk as contemplated by the statute. Not every object that falls on a worker gives rise to such extraordinary protections of Labor Law § 240(1). Here, Plaintiff failed to demonstrate the existence of a hazard contemplated by the statute and the failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. The ceiling collapse was not a significant inherent elevation risk involving materials or loads which needed to be positioned, hoisted or secured. Even though discovery had not yet been exchanged, based upon Plaintiff's allegations, there is simply no evidence that an object fell while being hoisted or secured because of the absence or inadequacy of a safety device of the kind enumerated in the statute. Also, there is no evidence that anyone was working on the ceiling or floor above, that previous work was completed on the ceiling or floor above, that the collapse

was caused by a burst water pipe, demolition, nor any ongoing construction work, besides Plaintiff's asbestos removal.

Additionally, the court agrees with Defendants 120 Broadway and Silverstein and finds that Labor Law § 240(1) does not apply in this case because the collapsed ceiling is part of the building's pre-existing structure which existed prior to work beginning at the site.

Under the doctrine of res ipsa loquitur, Plaintiff failed to demonstrate all of the requisite elements necessary to prevail on a summary judgment motion. Without providing any evidence of the nature of the construction work that was occurring on the premises, or whether demolition or any type of construction work had been completed on the premises except for Plaintiff's asbestos removal, the court has no way of determining whether 120 Broadway was negligent in causing Plaintiff's injuries, even with the presumption of negligence permitted under res ipsa loquitur. Additionally, Plaintiff failed to demonstrate that this case was the type of rare case in which summary judgment would be appropriate because the prima facie proof is so convincing that the inference of negligence arising therefrom is inescapable. Perhaps once discovery is completed, Plaintiff will have the opportunity to submit this case to the jury based upon res ipsa loquitur, but such presumption at this early stage in litigation does not warrant summary judgment in Plaintiff's favor.

Therefore, the court denies Plaintiff's motion for partial summary judgment for liability as against 120 Broadway on his claims under Labor Law § 240(1) and res ipsa loquitur and as against JRM on his claim under Labor Law § 240(1).

The court has considered any additional arguments raised by the parties which are not discussed herein and the court denies all requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Plaintiff Miroslaw Chrostowski's motion for partial summary judgment on liability as against Defendants 120 Broadway, LLC and JRM Construction Management, LLC.

This constitutes the decision and order of the court.

12/14/2021
DATE

ERIKA EDWARDS, 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