To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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MARTIN BERRY,

Plaintiff,

-against-

281 ROUTE 211 EAST LLC, 265 ROUTE 211 EAST LLC, MINA'S SPANISH KITCHEN 211, INC. and STEPHEN DE WINTER,

Defendants.

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DECISION AND ORDER
INDEX NO.: EF007297-2018
Motion Date: 9/10/2021
Sequence No. 2

SCIORTINO, J.

The following papers numbered 1 to 17 were considered in connection with plaintiff's motion for partial summary judgment pursuant to Labor Law §240(1) against defendant 265 Route 211 East LLC:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Stern)/Memorandum of Law/ Exhibits A - G	1 - 10
Affirmation in Opposition (Orloff)/Memorandum of Law/ Exhibits A - D	11 - 16
Reply Affirmation (Stern)	17

Background and Procedural History

This action for personal injuries arises out of an incident which took place on June 2, 2017. On that date, plaintiff, while working on premises owned by defendant 265 Route 211, fell from a scaffold to the floor.

The matter was commenced by the electronic filing of a Summons and Verified Complaint on July 13, 2018. The Complaint alleged, *inter alia*, violations of Labor Law §240(1). Issue was

joined as to defendants Mina's Spanish Kitchen 211, Inc. by Verified Answer on November 5, 2018. Issue was joined as to defendants 265 Route 211 East LLC and 281 Route 211 East LLC by Verified Answer on November 9, 2018.

Examination before Trial of the plaintiff, Martin Berry, was taken on November 17, 2020. Examination before trial of Franco Fidanza, property owner, on behalf of defendants 281 Route 211 East, LLC, and 265 Route 211 East, LLC, was taken on May 20, 2021. Examination before Trial of non-party John Radonis, plaintiff's employer, was taken on June 1, 2021.

Plaintiff's Deposition Testimony

Plaintiff testified that, as of the date of the accident, plaintiff had been performing interior, drywall, and acoustic installation for over thirty years. He received training in the proper use of scaffolds.

On June 2, 2017, he was working for John Radonis of Z Acoustics installing a drop ceiling. Upon arrival, he noticed that the job was a "mess" with construction debris on the floor. Scaffolds were assembled and ready for use when he arrived at the job site. The platform on the scaffold was set to a height of approximately five to six feet. Radonis, who advised that they would be installing ceiling molding, was under pressure to get the job done quickly. Prior to using the scaffold, plaintiff inspected the pins that secured the platform to the scaffold.

Plaintiff testified that, normally, he would use scaffold by locking the wheels; climbing the scaffold; performing the work, and, when he needed to move the scaffold, he would come down; unlock the wheels, and move the scaffold to a new area. However, on this day, Radonis told him not to lock the scaffold's wheels. Rather, plaintiff was using his body, while on the scaffold platform, to propel the scaffold forward (33). The only other time plaintiff had moved a scaffold in this manner

was when he had previously worked for Radonis.

Plaintiff acknowledged that unlocking the wheels and using his body to propel a scaffold was not the normal procedure for moving a scaffold, but "if he wanted to work, that's what [he] had to do" (35).

Though plaintiff would get down off the scaffold platform to clear debris out of the scaffold's path before climbing back up, he would then use his body to propel the scaffold approximately six feet while standing on the scaffold platform. Rodanis "was doing the same exact procedure" (38).

Just before the accident, plaintiff moved the scaffold while on the ground, then climbed back up and continued to propel it into the desired position. As he began to move the scaffold forward with his body, "the back went down and the front came up... quickly and violently" (68). He lost his footing as the scaffold platform "popped out." Although plaintiff did not know what caused his fall, he recalled Radonis subsequently telling him that one of the scaffold wheels had fallen into a hole in the concrete floor.

Non-Party Radonis Deposition Testimony

Radonis testified that he hired the plaintiff to help him complete the installation work at the site. Radonis provided and assembled the scaffolds used at the site. Although a time frame was not given for completing the job, he was advised that the work was to be completed quickly.

Radonis denied telling the plaintiff not to climb down and move the scaffold while on the ground or to propel the scaffold by using his body. However, he confirmed that, prior to beginning the job, he told plaintiff not to lock the scaffold wheels when using the scaffold because "to get up and down takes too much time" (38).

Though present at the time of the accident, Radonis did not observe plaintiff's fall.

Frank Fidanza Deposition Testimony

Fidanza testified that he hired Radonis to install the drop ceilings. He did not control or supervise the work performed, nor did he provide the scaffolding used. Fidanza arrived after the accident occurred and observed the area where plaintiff fell. He noted a hole, part of an incomplete floor drain, measuring between 6"x6" and 8"x 8" inches in area and 4 to 5 inches deep.

Motion for Summary Judgment

By Notice of Motion filed July 21, 2021, plaintiff seeks summary judgment on liability against owner 265 Route 211. Plaintiff argues that the scaffold scaffold he was working on tipped over causing him to fall to the floor. Plaintiff was engaged in construction work within the meaning of Labor Law § 240, and suffered a gravity-related injury. Plaintiff argues the failure of the protective device and the consequent injury is sufficient to establish cause. With the failure of a statutory safety device, the owner is "strictly liable" pursuant to Labor Law § 240(1). Scaffolds that fail, slip, collapse, or break are not safe. Plaintiff argues that, pursuant to Labor Law § 240, liability is imposed regardless of any negligence on the part of plaintiff.

Opposition

In opposition, defendant 265 Route 211 argues there was no violation of Labor Law 240(1). Plaintiff was provided with a scaffold which was not defective in any manner, and which did not tip as the result of any defect in or failure of the scaffold. Instead, the accident was the result of a defect in the floor over which the scaffold was moved during the accident. Radonis and the plaintiff both testified that they checked the scaffold for safety prior to its use. There is no evidence before the Court that the scaffold was defective or otherwise inadequate to protect plaintiff against injury.

Plaintiff testified that, at Radonis' request, plaintiff did not lock the wheels and used his body

to propel the scaffold forward to complete the task more expeditiously. Defendant argues that plaintiff's deposition testimony raises issues of fact with respect to plaintiff's misuse of the scaffold. Plaintiff is entirely responsible for his own injuries. He intentionally utilized the scaffold in an improper manner despite knowing the proper manner in which the scaffold was to be used.

Defendant contends that Plaintiff may not recover under Labor Law § 240(1). Based on these facts, the "recalcitrant worker" defense applies, and plaintiff's motion must be denied.

In support of the opposition, defendant appends the affidavit of Andrew R. Yarmus, P.E., F.NSPE. Yarmus reviewed the pleadings, deposition testimony, and documents submitted in support of the instant motion. Yarmus opines that the scaffold in question was an adequate safety device for the work being performed; it had been inspected by both Radonis and the plaintiff prior to its use on the date of the accident, and the scaffold functioned properly[1].

Reply

In reply, plaintiff argues it is undisputed that plaintiff used a safety device, provided by the employer, in a manner directed by the employer. Plaintiff's use of the device, at the direction of his supervisor, is sufficient to establish liability under the scaffold law.

The Court has fully considered the submissions of the parties.

Discussion

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact" (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The function of the Court on such a

[1] Yarmus draws legal conclusions which will not be considered by this Court.

motion is issue finding, and not issue determination, and the Court is obliged to draw all reasonable inferences in favor of the non-moving party (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000]).

Section 240(1) of the Labor Law requires owners and contractors to provide proper protection to those working on a construction site, and imposes absolute liability where the failure to provide such protection is a proximate cause of a worker's injury (*Fabrizi v. 1095 Ave. Of Americas, LLC,* 22 NY 3d 658 [2014]). In enacting the "scaffold law", the Legislature intended to place the ultimate responsibility for worker safety practices on the owners and general contractors, those parties best situated to bear that responsibility (*Zimmer v. Chemung Co. Performing Arts,* 65 NY 2d 513 [1985]; *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY 2d 494 [1993]). It is a non-delegable duty and an owner or contractor who breaches the duty may be liable in damages regardless of whether it has actually exercised supervision or control over the work (*Ross*, 81 NY 2d at 500; *Vergara v. WW 133 W 21, LLC*, 21 AD3d 279 [1st Dept 2005]). The statute is to be construed as liberally as necessary to provide the intended protections (*Wright v. State of New York*, 66 NY 2d 452 [1985]).

A fall from a scaffold does not establish, in and of itself, that proper protection was not provided (*Alava v. City of New York*, 246 AD2d 614 [2d Dept 1998]). In moving for summary judgment on a scaffold law claim, a plaintiff establishes *prima facie* entitlement to judgment through the submission of evidence which demonstrates the failure to provide sufficient protection which was a proximate cause of the injuries (*Vasquez v. C2 Development Corp.*, 105 AD3d 729 [2d Dept 2013]; *Treile v. Brooklyn Tillary, LLC*, 120 AD3d 1335 [2d Dept 2014; *Blake v. Neighborhood Hous. Servs.*

of N.Y. City, 1 NY 3d 280, 287 [2003]). When those elements are established, contributory negligence cannot defeat the plaintiff's claim (*Blake*, 1 NY3d 280, 287).

Plaintiff has established *prima facie* entitlement to judgment through the submission of evidence which demonstrates the failure to provide sufficient protection which was a proximate cause of the injuries (*Vasquez*, 105 AD3d 729). The deposition testimony establishes that Radonis explicitly directed plaintiff not to lock the scaffold wheels while performing work in order to enable him. Such a directive renders the safety device essentially unavailable to the plaintiff (*DeRose v. Bloomingdale's, Inc.*, 120 AD3d 41, 46 [1st Dept 2014]).

It is well settled that there are two defenses to a Labor Law 240(1) claim: (1) the sole proximate cause defense and (2) the recalcitrant worker defense (*Cordeiro v. Shalco Investments*, 297 AD2d 486 [1st Dept 2002]). Where a "plaintiff's actions [are] the sole proximate cause of his injuries, ...liability under Labor Law 240(1) [does] not attach" (*Robinson v. East Medical Center, LP*, 6 NY3d 550 [2006]). While plaintiff's actions may have been a proximate cause of the accident, this Court cannot conclude that such actions were the sole proximate cause of the accident (*Robinson*, 6 NY3d 550).

The recalcitrant worker defense is available if the plaintiff disregards an immediate instruction to use a harness or other actually available safety device (*Cahill v. Triborough Bridge and Atunnel Auth.*, 4 NY3d 35 [2004]). Here, it is undisputed that Radonis directed plaintiff not to lock the scaffold wheels. Plaintiff's did as he was directed; he not to use the scaffold wheel locks. In opposition, defendants have failed to raise a triable issue of fact precluding summary judgment.

Conclusion

On the basis of the foregoing, plaintiff's application for partial summary judgment on liability

against defendant 265 Route 211 East LLC on the basis of a violation of Labor Law §240(1) is granted.

A virtual status conference shall be held on January 28, 2022 at 9:00 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 3, 2021
Goshen, New York

ENTER

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*