SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 153536/2018

GILBERTO GONZALEZ,
Plaintiff,

MOTION SEQ. NO. 001

- v -

BROADWAY 371, LLC., HAILEY DEVELOPMENT GROUP LLC., HAILEY CONSTRUCTION LLC., and EL AD US HOLDING INC.,
Defendants.

DECISION + ORDER ON MOTION

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BROADWAY 371, LLC., HAILEY DEVELOPMENT GROUP LLC., HAILEY CONSTRUCTION LLC. & EL AD US HOLDING INC.,
Third-Party Plaintiffs,

Third-Party
Index No. 595494/2021

-against-

SOLUBON LTD.,
Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 55, 71, 72, 73, 75, 79

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

On March 9, 2016, plaintiff Gilberto Gonzalez, an employee of third-party defendant Solubon Ltd. ("Solubon"), was allegedly injured when he fell from a wooden plank used to adjoin the sidewalk shed and the balcony while tasked with installing window panels and applying silicone on the balcony of the second floor at the premises located at 371 Broadway, New York, New York 10013 in New York County. (NYSCEF Doc. No. 1, *summons and complaint*). The allegations are that plaintiff was walking on the plank to get to his work area when the plank moved, causing him to slip on marble dust that was on the plank, and that he fell approximately 3 ½ feet onto the balcony below. Plaintiff testified that the plank was nailed to wood.

In this action against Broadway 371, LLC., the owner of the premises; Hailey Development Group, LLC and Hailey Construction, LLC (collectively "HDG"), the construction manager; and El Ad US Holding, Inc. ("El Ad"), the developer, plaintiff asserts claims based on Labor Law §§ 240(1), 241(6) and 200; common-law negligence; *res ipsa loquitor;* and 29 CFR § 1926.450(a) et seq. of the Occupational Safety and Health Administration.

Defendants interposed a joint answer in this action, raising several affirmative defenses. (NYSCEF Doc. No. 2, *defendants' answer*). They later filed a third-party summons and complaint against Solubon. (NYSCEF Doc. No. 81, *third-party summons and complaint*).

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment against defendants, seeking judgment as to his Labor Law § 240(1) and 241(6) claims. (NYSCEF Doc. No. 22, *notice of motion for motion sequence 001*). Defendants oppose the motion. (NYSCEF Doc. No. 71, *affirmation in opposition to the motion*).

Plaintiff asserts that he is entitled to summary judgment on his Labor Law § 240(1) claim because he fell from an elevated height, while engaging in construction-related activity, when the scaffold plank plaintiff was using began to move without warning, causing him to slip on marble dust and fall approximately four feet to the balcony below. Additionally, plaintiff argues that summary judgment on his Labor Law § 241(6) should be granted as predicated on alleged violations of Industrial Code §§ 23-1.7(d); 23-5.l(b); and §23-5.l(c)(2) because defendants failed to provide a "scaffold plank" free from slippery conditions, failed to provide a scaffold with safety railings, and failed to properly anchor and/or brace the "scaffold plank." (NYSCEF Doc. No. 23, *Owaid's affirmation*).

In opposition to the motion, defendants argue the motion should not be considered given plaintiff's failure to provide certification of word count limit. Should the court consider the motion, defendants argue that plaintiff has abandoned all other claims for which relief has not been sought on this motion. They further contend that the expert affidavit of Kathleen Hopkins ("Hopkins"), filed in support of plaintiff's motion, should not be considered because it lacks probative value as it is speculative and relies on facts not in evidence. They further assert that Labor Law § 240(1) is inapplicable to the facts here because plaintiff did not fall off a working area but rather from a wooden plank that served as a throughway. Defendants further assert that plaintiff was not exposed to an elevation-related risk contemplated by the statute, particularly because plaintiff did not fall from a scaffold and the height differential at issue was less than four feet. They also argue that his accident was not caused by inadequate or the absence of enumerated safety devices and, in fact, that plaintiff was wearing a harness and the plank was nailed down to the wooden panels. With respect to the Labor Law § 241(6) claim, defendants contend that the industrial code sections alleged by plaintiff are inapplicable to the facts and were not the proximate cause of the accident. (NYSCEF Doc. No. 71, *Dewan's affirmation*).

In reply, plaintiff argues, *inter alia*, that it is entitled to summary judgment on its Labor Law § 240(1) claim because the plank was the functional equivalent of a scaffold and that the fact that plaintiff used the plank as a throughway does not prevent him from availing himself of the protections of Labor Law § 240(1) and further, that he has also established that there was an elevation-related risk because the plank was suspended approximately 3 ½ feet above the balcony onto which he fell and 17-18 feet off the ground. As to Labor Law § 241(6), plaintiff maintains that the admissible proof demonstrates that defendants violated §§ 23-1.7(d), 23-5.1(b), and 23-5.1(c)(2) of the Industrial Code. Plaintiff also contends that the court should consider the affidavit of Hopkins insofar as her expert opinion is based on the admissible evidence elicited during discovery and is thus proper to support a motion for summary judgment.

Plaintiff also denies that it has abandoned its remaining claims. (NYSCEF Doc. No. 79, *reply affirmation*).

"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 eliminate any material issues of fact from the case." (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006].)

As relevant here, Labor Law § 240(1) states that:

"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."

"'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . 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.'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis omitted]). To prevail on a section 240(1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries. (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004].)

As an initial matter, contrary to defendants' contention, plaintiff has not abandoned all claims for which he does not seek summary judgment on this motion. (*see* CPLR 3212[e] ["summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just."].) Moreover, while defendants are correct that failure to comply with the Uniform Rules requiring certification of the word-count serves as a basis to deny an application or reject those papers which fail to comply, this court will, in its discretion, address the merits of the application. (see *Cozzolino v N.Y.S. Div. of Hous. & Cmty. Renewal*, NYLJ, Aug. 3, 2021 at 17, col 1 [Sup Ct, NY County 2021].)

Here, upon a review of plaintiff's proof, including his deposition testimony, this court finds that, in light of his testimony that the plank moved, causing him to slip on marble dust and fall off the plank from an elevated height, he has established his *prima facie* entitlement to summary judgment under Labor Law § 240(1) (NSYCEF Doc. No. 31 at 66, 105-106, 108). (*Kind v 1177 Ave. of the Ams. Acquisitions, LLC*, 168 AD3d 408, 409 [1st Dept 2019] [finding

that the tilting or collapse of the scaffold was *prima facie* evidence of a violation of Labor Law § 240(1)].) Addressing defendants' arguments regarding the reference to the plank as a "plank scaffold", which is also an argument raised to challenge the expert affidavit of Kathleen Hopkins, the fact that plaintiff fell off a plank, or that it was being used as a throughway to get to his work area place rather than being the working surface at the time of plaintiff's fall, does not, under these circumstances, foreclose a Labor Law § 240(1) claim. (see *Rubio v NY Proton Mgt., LLC*, 192 AD3d 438, 439 [1st Dept 2021]; *DeFreitas v Penta Painting & Decorating Corp.*, 146 AD3d 573, 573 [1st Dept 2017]; *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 8-9 [1st Dept 2011].) Moreover, Hopkins, a certified site safety manager with over forty-one years of experience, after reviewing, among other things, plaintiff's deposition testimony, opines that the plank should have had some safety railings or some other mechanism to prevent plaintiff's fall and that defendants should have provided plaintiff proper safety protection (i.e., harness, lanyard and anchorage point) to protect him from height-related risks. (NYSCEF Doc. No. 25, *Hopkins's affidavit*). This court agrees.

Furthermore, that plaintiff may have only fallen a few feet is of no consequence here. (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011] ["(t)here is no bright-line minimum height differential that determines whether an elevation hazard exists.]; see *Brown v 44 St. Dev., LLC*, 137 AD3d 703, 704 [1st Dept 2016]; *Arrasti v HRH Constr. LLipegueroC*, 60 AD3d 582, 583 [1st Dept 2009] [finding that 18 inches was sufficient to create an elevation-related risk]; *Lelek v Verizon NY, Inc.*, 54 AD3d 583 [1st Dept 2008] [the height deferential of 2 ½ -3 feet did not foreclose a Labor Law § 240(1) claim].) Moreover, although defendants rely on OHSA regulations to argue that plaintiff did not fall from an actionable height under Labor law § 240(1), this is equally without merit: "Labor Law § 240(1) 'contain[s] its own specific safety measures' . . . and, thus, an owner's asserted compliance with OSHA regulations does not defeat plaintiff's prima facie showing." (*Dalaba v City of Schenectady*, 61 AD3d 1151, 1153 [3d Dept 2009], quoting *Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; see also *Hoyos v NY-1095 Ave. of Americas, LLC*, 156 AD3d 491, 495-496 [1st Dept 2017].)

Although the burden shifts to defendants to raise an issue of fact with respect to this claim, they fail to meet this burden. Defendants argue that the there is no evidence that the accident was caused by the lack or absence of enumerated safety devices because plaintiff was provided with a harness meant to protect him from falling; the plank was nailed down; and that plaintiff only fell from the plank because he slipped on marble dust. However, no adequate safety devices were provided to plaintiff to prevent him from falling off the plank and, although a harness was provided, plaintiff made clear at his deposition that it could only be tied where his work was being performed and not in the area surrounding the plank where he fell. (NYSCEF Doc. No. 31 at 138). (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000] ["(w)hether the device provided proper protection is a question of fact except when, the device collapses, moves, falls, or otherwise fails to support the plaintiff and his materials."]; *Cuentas v Sephora USA, Inc.*, 102 AD3d 504, 504 [1st Dept 2013]; *Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011]; *Vukovich v 1345 Fee, LLC*, 61 AD3d 533, 534 [1st Dept 2009].) Insofar as defendants have failed to proffer proof that the plank did not move; that plaintiff was the sole proximate cause of his injuries or that the harness was, in fact, meant to also protect workers crossing over the plank to get to their work area, summary judgment is granted as to plaintiff's Labor Law § 240(1) claim.

Turning next to plaintiff's Labor Law § 241(6) claim, it is well-settled that Labor Law § 241(6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers." (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993].) However, "[t]o establish liability under the statute, a plaintiff must specifically plead and prove the violation of an applicable Industrial Code regulation." (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]; see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 502).[1]

12 NYCRR § 23.1.7(d) provides the following:

> "Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

The motion is denied with respect to plaintiff's Labor Law § 241(6) claim predicated on 12 NYCRR § 23.1.7(d). While this court acknowledges plaintiff's deposition testimony that he slipped on marble dust that had accumulated on the plank, the affidavit of defendants' expert, a mechanical engineer, Peter Chen, challenges whether said condition was in fact slippery. Chen affirms that plaintiff fails to specify the quantity of marble dust on the plank, testifying only that there was a "bunch of dust." He further affirms that

> "[d]ust is common during construction and throughout areas of construction, but is not considered slippery or evidence of a slippery condition. As evidenced by 23-1.7(d), one way of remediating a slippery condition is the use of sand, which [in and] of itself could be considered dirt, debris, and/or a foreign substance. In the flooring industry, additives of similar size and composition to sand and marble dust are used to create grit and increase the slip resistance of flooring. Therefore, the presence of marble dust was not a slippery condition, and there was no violation of 23-1.7(d)." (NYSCEF Doc. No. 54, *Chen's Affidavit*).

Insofar as there is, at the very least, an issue of fact as to whether there was a slippery condition on the plank, that branch of the motion seeking liability on that cause of action is denied. All remaining issues have been addressed and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that he seeks summary judgment on his Labor Law § 240(1) claim, and it is otherwise denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry,

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[1] In addressing plaintiff's Labor Law § 241(6) claim, it should be noted that, pursuant to this court's decision and order addressing defendants' motion for summary judgment, only that branch of the Labor Law § 241(6) claim premised on an alleged violation of 12 NYCRR § 23.1.7(d) remains. The motion is moot as to all other provisions and as such, they are not discussed herein.

upon defendants, as well as the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

October 8, 2021

HON. VERNA L. SAUNDERS, JSC

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