SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. 4, 5

FIDEL ESTELA and LUIS APONTE PUJA,

Plaintiffs,

- against -

CRESCENT & 27 LLC, GALAXY DEVELOPERS LLC, And ACCESS SOLUTIONS GROUP, LLC,

Defendants.

and Third-Party action.

Index No.: 27541/2017

DECISION and ORDER

	Papers Numbered
Notice of Motion, Affirmation, Memorandum of Law, Statement of Facts, Exhibits (Mtn #4)	1, 2, 3, 4, 5
Affirmation in Opposition, Memorandum of Law in Opposition, Response to Material Facts, Exhibits	6, 7, 8, 9
Affirmation in Reply	10
Notice of Motion, Affirmation, Statement of Facts, Affidavits, Exhibits (Mtn. #5)	11, 12, 13, 14, 15
Affirmation in Opposition, Exhibit, Response to Statement of Facts, Memorandum of Law	16, 17, 18, 19
Affirmation In Reply, Exhibit	20, 21
Affirmation In Reply, Exhibit	22, 23

Upon the enumerated papers and due deliberation Plaintiffs' motion for summary judgment is granted in part, in accordance with the annexed decision and order.

Dated: October 12, 2021

Hon. **LUCINDO SUAREZ, J.S.C.**

Check one:
☐Case Disposed in Entirety
☒Case Still Active

Motion is:
☐Granted ☒ GIP
☐Denied ☐ Other

Check if appropriate:
☐ Schedule Appearance ☐ Settle Order
☐ Fiduciary Appointment ☐ Submit Order
☐ Referee Appointment

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Plaintiffs,

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CRESCENT & 27 LLC, GALAXY DEVELOPERS LLC, And ACCESS SOLUTIONS GROUP, LLC,

Defendants.

DECISION and ORDER

CRESCENT & 27 LLC AND GALAXY DEVELOPERS LLC,

Third-Party Plaintiffs,

- against -

SUNSHINE OF EAST COAST, INC.,

Third-Party Defendants.

PRESENT: Hon. Lucindo Suarez

The issue in Plaintiffs' motion is whether they have established sufficient evidentiary facts to entitle them to judgment as a matter of law on their Labor Law §§240(1) and 241(6) claims. This court finds Plaintiffs established their *prima facie* burden as to their Labor Law §240(1) claim. However, with respect to Plaintiffs Labor Law §241(6) claims this court finds that they only established their *prima facie* burden only as to Industrial Codes 12 NYCRR §§23-2.2(a) and 23-2.2(c)(1).

Plaintiffs were tasked with smoothing out wet concrete on the 8th floor of a constructions site when the floor they were working on collapsed. An investigation completed by the Department of Buildings yielded that Third-Party Defendant SUNSHINE improperly installed the shoring, failing to secure them at the top and bottom and that the shoring was not as specified by the engineering plans. Neither Plaintiff was provided with any safety devices to prevent their respective fall and both Plaintiffs sustained injuries as a result. Plaintiffs now argue that Defendants violated Labor Law §240(1) when the temporary concrete floor collapsed as it was not properly shored or reinforced.

I. Labor Law §240(1)

Pursuant to Labor Law §240(1), owners, contractors and their agents "shall furnish or erect, or cause to be furnished or erected . . . devices which shall be so constructed, placed and operated as to give proper protection." Labor Law §240(1) imposes a nondelegable duty upon owners and contractors to provide safety devices to protect workers from risks inherent in elevated work sites. *See McCarthy v. Turner Constr., Inc.,* 17 N.Y.3d 369, 953 N.E.2d 794, 929 N.Y.S.2d 556 (2011). Plaintiff must demonstrate both a violation of the statute and the violation's proximate cause of the injury. *See Blake v. Neighborhood Hous. Servs.*, 1 N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484 (2003). Specifically, the hazards contemplated by the statute "are those related to the effects of gravity where protective devices are called for…because of a difference between the elevation level of the required work and a lower level. *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 561, 626 N.E.2d 912, 606 N.Y.S.2d 127 (1993).

Defendants argue Plaintiffs' motion is premature as depositions are not complete and the note of issue was not filed at the time the motion was made. In addition, Defendants argue that triable issues of fact exist, as an expert who opined on the accident, gave two different theories

of how the accident may have occurred. Lastly, Defendants argue that a violation of Labor Law §240(1) did not occur as the 8th floor structure that collapsed under Plaintiffs was a permanent structure therefore, putting the burden on Plaintiffs to prove foreseeability.

The court disagrees with Defendants. Both Plaintiffs were deposed and demands and responses were exchanged. As such, this court finds that the instant motion is not premature. Further, this court finds that the structure that collapsed from under Plaintiffs was not a permanent structure. Plaintiffs provided this court with an abundant amount of pictures and videos from the date of the accident. It was apparent to this court from the evidence provided and the testimony given by both Plaintiffs that the structure was not permanent at the time of their fall. As such, since the accident occurred at an elevated height of a non-permanent structure and Plaintiffs were not provided with proper safety devices, this court finds that Plaintiffs have met their *prima facie* burden in proving a violation of Labor Law §240(1) occurred. *See Cross v. CIM Group, LLC*, 154 A.D.2d 432, 60 N.Y.S.3d 806 (1st Dep't 2017). Lastly, Defendants' argument that triable issues of fact exist based on the expert's affidavit is merely speculative and does not raise any triable issues of fact.

II. Labor Law §241(6)

Labor Law §241(6), imposes a nondelegable duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed. *Rizzuto v. L.A. Wenger Contr. Co.,* 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 (1998). The standard of liability under Labor Law §241(6), requires that a plaintiff allege that an owner or general contractor breached a specific rule or regulation containing a positive command. *See Ross v. Curtis-Palmer Hydro-Elec. Co.,* 81 N.Y.2d 494, 618 N.E.2d 82, 601

N.Y.S.2d 49 (1993). In addition, Labor Law §241(6), requires that a plaintiff establish that a violation of a safety regulation was the proximate cause of the accident. *See Gonzalez v. Stern's Dept. Stores*, 211 A.D.2d 414, 622 N.Y.S.2d 2 (1st Dep't 1995).

Plaintiffs claim that Defendants violated 12 NYCRR §§23-2.2(a), (b), (c)(1), (c)(3) and 23-2.4(b).

A. 12 NYCRR §23-2.2(a)

12 NYCRR §§23-2.2(a) provides "[f]orms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape.

Plaintiffs contend that the instant Industrial Code was violated in that, the forms, shores, and reshores supporting the subject temporary floor were not properly braced and failed to maintain its position as evidenced by its collapse. In addition, Plaintiffs rely on the engineering reports generated by Becker Engineering, P.C. ("Becker") and Titan Engineers P.C. ("Titan") who opined that the subject shores supporting the temporary flooring were not nailed or connected to the floor or ceiling, the shores were not plumb, and the wood beams supporting the floor were cracked. Moreover, Plaintiff, Luis Aponte Pujay, relies upon his expert witness professional engineer, Herbert Heller, Jr., who opined that the shoring used was not structurally safe as evidenced by the collapse.

In oppostion, Defendants argue that there are triable issues of fact as to whether the forms, shores, and reshores were properly braced or tied together as Becker, Titian, and Mr. Heller did not inspect the temporary flooring prior to its collapse. Therefore, Defendants posit that Plaintiffs' experts opinions are based on speculation as they cannot actually determine what caused the collapse of the temporary flooring solely based on their post-accident observations.

This court finds that Titian's, Becker's, and Mr. Heller's expert opinions were sufficient to

establish Plaintiffs' *prima facie* burden that this Industrial Code was violated, and that the violation was the proximate cause of their accident. Said reports found that because the subject shores were loose or were at an angle that it contributed to the collapse of the floor. Defendants' arguments in oppostion failed to raise any triable issues of fact. Moreover, they did not present any evidence to contradict Plaintiffs' expert witness' opinions that the subject shoring was not structurally safe.

B. 12 NYCRR §23-2.2(b)

12 NYCRR §23-2.2(b) provide that "[d]esignated persons shall continuously inspect the stability of all forms, shores and reshores including all braces and other supports during the placing of concrete. Any unsafe condition shall be remedied immediately."

Plaintiffs argue that Defendants did not provide any information through discovery to establish that in fact, they complied with the mandates of this Industrial Code. In addition, Plaintiff, Luis Aponte Pujay, relies upon his expert witness, Mr. Heller, who opined that Defendants failed to comply with this Industrial Code in that, they did not conduct continuing inspections and remedy the hazardous conditions of the shoring. In oppostion, Defendants argue that there are triable issues of fact as to whether the inspections were conducted.

This court finds that based on the record before the court Plaintiffs failed to prove that their *prima facie* burden that this Industrial Code was violated. There was no evidence presented that Defendants did not designated a person to continuously inspect the stability of all forms, shores and reshores.

C. 12 NYCRR §23-2.2(c)(1)

12 NYCRR §23-2.2(c)(1) provides that "[n]ecessary horizontal and diagonal bracing shall be provided in both longitudinal and transverse directions to provide structural stability of beams,

floors and roofs. Shores and reshores shall be properly seated top and bottom and shall be secured in place."

Plaintiffs rely upon the Becker's and Titian's engineers' reports to support their contention that the subject shores were not properly secured in violation of the instant Industrial Code. Further, Plaintiff, Luis Aponte Pujay, relies upon his expert witness, Mr. Heller, who opined that Defendants failed to provide a structurally safe installation of the shoring and to secure in place the top and bottom of the shore posts. In oppostion, Defendants contend that there are triable issues of fact as to whether this Industrial Code was violated.

This court finds that Titian's, Becker's, and Mr. Heller's expert opinions were sufficient to establish Plaintiffs' *prima facie* burden that this Industrial Code was violated, and that the violation was the proximate cause of Plaintiff's accident. Defendants' arguments in oppostion failed to raise any triable issues of fact.

D. 12 NYCRR §23-2.2(c)(3)

12 NYCRR §23-2.2(c)(3) provides "[w]here the sum of the dead and live loads on the forms may exceed 150 pounds per square foot, the design of such forms, including shores, reshores and bracing, shall be as specified by a professional engineer licensed to practice in the State of New York. Such design plans and specifications shall be kept on the job site available for examination by the commissioner. All forms, shores, reshores and bracing shall be constructed and installed in accordance with such design plans and specifications."

Plaintiffs rely on Titan's report who opined that Defendants did not follow the engineering plans as it failed to use the specific types of shores that the engineering plans required. Plaintiffs

claim that the shores used by Defendants had a lower load capacity than the ones called for in the engineering plans.

In oppostion, Defendants argues that Plaintiffs did not provide any evidence whether the dead and live loads on the forms exceeded 150 pounds per square foot. Moreover, they rely on Titan's engineer's report who opined that the concrete slab supporting the collapsed material had sufficient capacity to support the collapse formwork and the weight of the concrete from the 8th floor.

This court finds that Plaintiffs failed to prove their *prima facie* burden that this Industrial Code was violated. There was no evidence produced by Plaintiffs that the dead and live loads on the forms exceeded 150 pounds per square foot or that the shores used by Defendants could not hold an excess of 150 pounds per square feet.

E. 12 NYCRR §23-2.4(b)

12 NYCRR §23-2.4(b) provides that "The erection floor shall be covered over the entire surface except for access openings. Such flooring shall be of the proper strength to support the working load intended to be imposed thereon. Such temporary flooring shall be laid tight and secured against movement."

Plaintiffs argue that this Industrial Code is specific enough to serve as Labor Law §241(6) predicate. Further, Plaintiffs rely upon Titian's engineering reports that opined that the temporary platforms collapsed because the shoring supporting failed. In oppostion, Defendants contend that this Industrial Code is inapplicable. Defendants argue that this Industrial Code only relates to flooring that is erected by a tower crane or derrick. Moreover, Defendants rely on their expert witness civil engineer, Mr. Bernard Lorenz, who opined that the subject Industrial Code is

not applicable as the building was of reinforced concrete and not a skeletal steel construction in a tired building.

This court finds that Plaintiffs failed to prove the applicability of this Industrial Code. The temporary flooring Plaintiffs were working upon on the day of their accident was being constructed by pouring concrete to create the floors. The provisions of 12 NYCRR 23-2.4(b) relate to temporary and permanent flooring in skeleton steel construction. Therefore, the cited code provision has no applicability to the facts at bar. *See Giordano v. Forest City Ratner Cos.*, 43 A.D.3d 1106, 842 N.Y.S.2d 552 (2d Dep't 2007).

Accordingly, it is

ORDERED, that Plaintiffs' motion for summary judgment on their Labor Law §240(1) claim is granted; and it is further

ORDERED, that Plaintiffs' motion for summary judgment on their Labor Law §241(6) claim is granted in part.

This constitutes the decision and order of the court.

Dated: October 12, 2021

Lucindo Suarez, J.S.C.