SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK NERVO** **PART** **04**

Justice

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SAMUEL CUTCHIN

Plaintiff,

- v -

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Defendant.

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INDEX NO. 160657/2017

MOTION DATE 07/01/2021, 07/02/2021

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 57, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 79, 80, 81, 82

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 70, 71, 72, 73, 74, 75, 76, 77, 78

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

Upon the foregoing documents, and following on-the-record argument, the Court finds that issues of fact preclude summary judgment.

As an initial matter, the Court notes that plaintiff's insinuation that by filing a competing summary judgment motion, defendant has engaged in gamesmanship betting that when reviewing competing summary judgment motions this Court has a propensity to "throw its hands in the air and say issues of fact" is unhelpful in resolving this issues at hand and has no place in any court filing (NYSCEF Doc. No. 70 at ¶ 8; *Nachbaur v. American. Transit Ins. Co.*, 300 AD2d 74 [1st Dept 2002]; *see also Benefield v. New York City Hous. Auth.*,

260 AD2d 167 [1st Dept 1999]). To be sure, this Court has done no such thing, and has carefully reviewed the record and arguments presented by the parties.[1]

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

Labor Law § 240(1) provides, in pertinent part:

> all contractors and owners ... 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.

[continued on following page]

[1] Likewise unhelpful is any contention that the burden on summary judgment is met by that party which is first to file a summary judgment motion (*id.*).

The duty imposed by Labor Law § 240(1) is nondelegable; an owner or contractor may be held liable regardless of whether such party actually exercised supervision or control over the work (*Haimes v. New York Tel. Co.*, 46 NY2d 132 [1978]; *compare Russin v. Picciano & Son*, 54 NY2d 311 [1981], Labor Law § 200). Labor Law § 240(1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was ... framed" (*Koenig v. Patrick Constr. Corp.*, 298 NY 313 [1948] quoting *Quigley v. Thatcher*, 207 NY 66 [1912]). However, the injury claimed under § 240(1) must result from elevation-related hazards, "injuries resulting from other types of hazards are not compensable under that statute even if proximately caused by the absence of an adequate scaffold or other required safety device" (*Ross v. Curtis-Palmer Hydro-Electric Co.*, 21 NY2d 494 [1993] Back strain alleged because platform was placed in manner requiring worker to contort not within class of hazards contemplated by Labor Law § 240[1]; *Rocovich v. Consolidated Edison Co.*, 78 NY2d 509 [1991]). That an accident occurred at an elevated height, without more, is insufficient to trigger the protections of Labor Law § 240(1) (*Reyes v. Magnetic Constr., Inc.*, 83 AD3d 512 [1st Dept 2011]; *see also Auchampaugh v. Syracuse Univ.*, 57 AD3d 1291 [3d Dept 2008]).

As conceded at oral argument, the only evidence that plaintiff fell from a height is plaintiff's own testimony; the alleged accident was unwitnessed (*see generally Caraballo v. Kingsbridge Apt. Corp.*, 59 AD3d 270 [1st Dept 2009]). Although plaintiff characterizes the affidavit testimony of Tommy Hage as that of a witness, upon a mere cursory reading of same, there is no basis provided for the assertions therein (NYSCEF Doc. No. 38). Stated differently, Mr. Hage does not state how he came to learn of plaintiff's accident, whether as a first-hand eyewitness or second-hand learning after the fact (*Marrero v. 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] foreman's testimony insufficient to raise triable issue of fact to defeat plaintiff's summary judgment motion where foreman did not witness the accident). Further, it is glaringly obvious Mr. Hage did not witness plaintiff fall from a height, as such observation is not noted in his affidavit.

Put simply, while plaintiff alleges he suffered a fall, the distance plaintiff fell is at issue, as is the nature of how plaintiff fell. Furthermore, there is conflicting evidence regarding the safety devices available to plaintiff, including ladders, whether a ladder was necessary for plaintiff's proper protection, and whether plaintiff chose not to use an available ladder at the time of plaintiff's alleged accident, as required (*see Vasquez v. GAPLWQ Realty, Inc.*, 236 AD2d 311

[1st Dept 1997]; see also *Isnardi v. Genovese Drug Stores, Inc.*, 242 AD2d 671 [2d Dept 1997] reversing order granting plaintiff summary judgment, finding issue of fact as to whether plaintiff was a recalcitrant worker not protected by the Labor Law by failing to use provided safety device; *see also Jastrzebski v. North Shore School Dist.*, 223 AD2d 677 [2d Dept 1996] *aff'd* 88 NY2d 946 [1996]). Citations to expert testimony, or lack thereof, and contradictions within the record all militate in favor of finding the existence of question of fact to be resolved by the jury.

The issues of fact precluding summary judgment on plaintiff's motion likewise preclude summary judgment on defendant's summary motion to dismiss the complaint.

Accordingly, it is

ORDERED the motions are denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

1/18/2022
DATE

FRANK NERVO, 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