SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46V**

Justice

X

EARLE MALLORY, DANA MALLORY,

Plaintiff,

- v -

VALLIS, LLC,ALEX FRIDLYARD, ALEX FRIDLYAND, INDIVIDUALLY AND D/B/A THE GABLES FARM

Defendant.

X

INDEX NO. 159063/2019

MOTION DATE 11/19/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

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

Upon the foregoing documents, it is ordered that plaintiff's motion for summary judgment pursuant to Labor Law §§§ 240(1), 241(6), and 200 and defendants' cross motion for summary judgment, dismissing plaintiff's complaint, are determined as follows:

Plaintiffs commenced the instant action alleging that Earle Mallory was injured while working on a mobile, motorized work scaffold ("scissor lift"), at least 13 feet off the ground, on August 16, 2019 at the Gables Farm when the under-construction barn he was working within collapsed, toppling over the lift.

In support of the motion, the movants and cross movants submit, inter alia, the deposition transcripts of defendant Alex Fridlyand (member of Vallis LLC [herein "Vallis"]), plaintiff Earle L. Mallory, Jr. (employee of Bijou Contracting, Inc.), Tyler Silveira/Bijou Contracting, Inc. (owner/general contractor of the subject barn that collapsed), Samuel Migliorelli (employee of Bijou Contracting, Inc.), Robert Mackey (Silveira's friend who assisted at project), Gerald Krupa (Vallis farmhand), and the expert affidavit of Alden P. Gaudreau, PhD.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating that absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez,* 68 NY2d at 324; *see also Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Chance v Felder,* 33 AD3d 645, 645-646 [2d Dept 2006]).

Alex Fridyland as an Individual Defendant

As a preliminary matter, all causes of action are dismissed as to Alex Fridlyand, individually. Nothing in the record indicates that Fridlyand, individually, possessed or exercised supervisory control and authority over the work being performed (*compare Johnson v City of New York*, 120 AD3d 405 [1st Dept 2014](Bovis found to be statutory agent where found to have acted as the "eyes and ears" of the project, and had broad responsibility to coordinate and supervise the work of the contractors); *Walls v Turner Constr. Co.*, 4 NY3d 861 [2005]).

In determining whether someone is a statutory agent for the purposes of the Labor Law, courts generally examine whether a third-party contractor, construction manager, or superintendent was delegated the safety responsibilities of the owner by, in practice, having been regularly on site, having the responsibility for coordinating the work, and having the authority to stop unsafe work practices and to report unsafe conditions to the trade foreman (*see Kittelstad v Losco Group, Inc.*, 92 AD3d 612 [1st Dept 2012]; *see Rainer v Gray-Line Development Co., LLC*, 2012 WL 9570399 [Sup Ct, New York County 2012, Scarpulla, J.], *mod* 117 AD3d 634 [1st Dept 2014]). Here, it is evident that Fridlyand is a member of the ownership LLC and not a third-party. Moreover, he testified that he never assists on any construction projections at Gable's Farm as

"[he] would be useless." He added that when it comes to these types of projects, "he does not understand all the things, about how things are done." With respect to the subject construction of the pole barn, the testimony produced essentially demonstrated that Fridlyand showed Silveira a picture of the type of red barn he wanted, told him where it should go, what size it should be, and then left it to Silveira and Bijou Contracting, Inc. to produce the barn based on the agreed upon quoted price for materials and labor. It is undisputed that Silveira supervised and controlled the construction of the subject pole barn and that Fridyland was largely out of contact with the project while on safari with his family in Africa at the time of the accident, shortly after the project had commenced (*see generally Vazquez v Humboldt Seigle Lofts, LLC*, 145 AD3d 709 [2d Dept 2016]). Moreover, even if Fridyland did exercise the requisite safety supervisory control, this would be through his capacity as a member of the ownership LLC, Vallis, and not individually as a third-party agent to the owner.

Labor Law § 200

For many of the reasons stated above, Vallis cannot be held liable pursuant to Labor Law § 200.

Labor Law § 200 (1) provides, in pertinent part, as follows:

> [a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

It is well settled that the purpose of Labor Law § 200 was to codify the common law duty owed by owners and general contractors to maintain a safe work site (*see Comes v New York State Electric & Gas Corp.*, 82 NY2d 876 [1993]). Claims for personal injury under Labor Law § 200

and common law negligence fall into two categories: (1) those arising from the manner in which the work was performed and (2) those arising from an alleged defect or dangerous condition existing on the premises (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]).

Plaintiffs generally contend that Vallis is negligent both based on the careless supervision and control of the manner in which the work by Bijou's employees or subcontractors was performed and also due to the dangerous or defective conditions of or on the premises. As to the former, it is undisputed that it was Silveira who supervised and controlled plaintiff Mallory and not Vallis (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]; *see also Hughes v Tishman Constr. Corp*., 40 AD3d 305, 311 [1st Dept 2007] (liability under a means and methods analysis "requires actual supervisory control or input into how the work is performed")). .

Nevertheless, plaintiffs believe the stronger argument is the latter, that Vallis created the dangerous and unsafe condition of the inadequately braced barn through its contractor, Bijou, and had actual or constructive knowledge of the condition. Specifically, plaintiffs maintain that Fridlyand admitted to a certain level of involvement in the planning, design, and presence at the site and had knowledge that the scissor lift was rented without safety harnesses or lanyards and would be used for dangerous above-ground work under the unsafe roof trusses[1]. Notwithstanding the actual lack of evidence adduced to demonstrate that Vallis through Fridyland had genuine input or knowledge of the structural design of the barn, had presence at the site, and/or knew about the type of scaffold that would be used, the defects that the plaintiffs describe are not defects inherent

[1] Plaintiffs do not explicitly make the unavailing argument that Vallis created the dangerous condition through its farmhand, utilizing Vallis equipment to create insufficiently small holes for the footings. Although plaintiff's expert does aver to a reasonable degree of scientific and/or engineering certainty that the small footings are one of the manycauses that lead to the barn's collapse, it is undisputed that Silveira was aware that the footing holes were too small and rented separate equipment to drill larger holes, which he could have then expanded with a shovel.

with the property but are instead the result of the manner in which Mallory's employer performed the work in attempting to construct the pole barn (*see Williams v Turner Const. Co.*, 2012 WL 6617352 [Sup Ct, New York County 2012, Edmead, J.]; *see Dalanna v the City of New York*, 308 AD2d 400 [1st Dept 2003]). As such, Vallis' potential negligence must be predicated on their control and supervision, which, as previously established, was non-existent. Thus, that branch of plaintiffs' motion pursuant to Labor Law § 200 is denied, and the corresponding branch of defendants' cross motion is granted.

Labor Law § 241(6)

Labor Law § 241 (6) provides, in pertinent part:

> "[a]ll contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection for workers and to comply with specific safety rules which have been set forth by the Commissioner of the Department of Labor (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 413 [2011]). In order to demonstrate liability pursuant to Labor Law § 241 (6), it must be shown that the defendants violated a specific, applicable regulation of the Industrial Code, rather than a provision containing only generalized requirements (*see Nostrom v A.W. Chesterton Co.,* 15 NY3d 502, 507 [2010]).

Here, plaintiffs allege that defendants violated 12 NYCRR 23-18.8(c)(1). 12 NYCRR 23-18.8(c)(1), "which makes approved safety hats for persons 'required to work or pass within any area where there is a danger of being struck by falling objects or materials' is sufficiently concrete

to give rise to Labor Law 241(6) liability" (*Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686 [1st Dept 2017](citations omitted)).

Here, defendants argue that 12 NYCRR 23-18.8(c)(1) is inapplicable since this was not a hard-hat job (*see Spiegler v Gerken Bldg. Corp.*, 57 AD3d 514 [2d Dept 2008]; *Modeste v Mega Contracting Inc*., 40 AD3d 255 [1st Dept 2007]). However, where the nature of the work that morning involved the securing of the overhead roof with hurricane clips and the removal of temporary overhead bracing, appropriate headgear should have been provided (*see Bornschein v Shuman*, 7 AD3d 476 [2d Dept 2004]; *Melendez v Brown-United, Inc.*, 68 Misc3d 1202[A][Sup Ct, New York County 2020, Lebovits, J.]; *Quishpi v 80 WEA Owner, LLC*, 145 AD3d 521 [1st Dept 2016](hard hats required where risk of being struck by falling objects or materials or where the hazard of head bumping exists)).

Nevertheless, based on the testimony of Silveira, Migliorelli, and Mackey, and the affidavit of plaintiffs' expert, triable issues of fact exist as to whether plaintiff Mallory was required to wear one of the 3M hard-hats that was available on site, whether the 3M hats available constituted approved safety hats, and whether a lack of appropriate headgear constituted a proximate cause of plaintiff Mallory's injuries. Thus, the branches of plaintiffs and defendant Vallis' summary judgment motions pursuant to Labor Law § 241(6) are both denied.

Labor Law §240(1)

Labor Law §240(1), commonly referred to as the "scaffold law," provides, in relevant part:

> All contractors and owners and their agents, except owners of 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.

The First Department summarized the requirements of Labor Law § 240(1) in *Vasquez v Cohen Brothers Realty Corp.,* 105 AD3d 595 [1st Dept 2013]). The Court stated:

> An owner or its agent is liable under Labor Law Section 240(1) if the plaintiff was injured while engaged in an activity covered by the statute and [was] exposed to an elevation-related hazard for which no safety device was provided or the device provided was inadequate. The statute requires "owners and their agents" to provide workers with adequate safety devices when they engage in activities such as repairing or altering a building. The purpose of the statute is to protect workers by placing the ultimate responsibility for worksite safety on the owner, and Labor Law Section 240(1) imposes strict liability on the owner for a breach of the statutory duty which has proximately caused injury (*Vasquez,* 105 AD3d at 597).

The purpose of Labor Law § 240(1) is to protect workers by placing responsibility for safety practices at construction sites on owners and general contractors, those best suited to bear the responsibility, instead of on the workers, who are not in a position to protect themselves (*see John v Baharestani,* 281 AD2d 114, 117 [1st Dept 2001]).

"In evaluating a claim under Labor Law § 240(1), the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against the risk arising from a physically significant elevation differential" (*see Cuentas v Sephora USA, Inc.,* 102 AD3d 504 [1st Dept 2013]). The statute must be construed as liberally as may be for the accomplishment of the purpose of protecting workers who are exposed to gravity related risks (*see Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.,* 118 AD3d 524, 526 [1st Dept 2014]). The question as to whether the statute applies to a particular accident is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against harm directly flowing from the application of the force of gravity to an object or person (*see Arnaud v 140 Edgecomb LLC,* 83 AD3d 507, 508 [1st Dept 2011]).

Plaintiffs contend that liability pursuant to Labor Law § 240(1) should be granted under either a "falling objects theory" or "elevation related risk theory," or both. Under the "falling objects theory," plaintiffs' rationale is that the overhead materials and structural components of the barn's roof and walls collapsed, toppling over the scissor lift and landing on plaintiff. Under the "elevation related risk theory," plaintiffs' rationale is that the defendants failed to provide Mallory with the proper protection from falling while 13 feet above ground on the scissor lift.

It is undisputed that Mallory's task was to install "hurricane clips or ties" to secure the roof trusses to the top of the barn walls. To do this Mallory stood inside the basket cage of a scissor lift that elevated him towards the roof. The cage protected Mallory along the sides but had an open top. Despite the rental agreement for the scissor lifts stating that safety harnesses were required during operation, Silveira testified that no harnesses or lanyards were in use despite being available since he did not believe they were typically used for scissor lifts. Plaintiff's co-worker, Samuel Migliorelli, averred that as he was working on his own scissor lift on the other side of the barn when he heard a cracking noise and then the entire barn collapsed. As his scissor lift toppled over, it fell outside of the crash radius of the barn roof and walls. He explained that since Mallory's lift was on the other side of the barn it toppled towards the center of the accident site. When Migliorelli found Mallory, he was completely underneath the collapsed barn and outside of the protective cage of the scissor lift. Similarly, Mallory testified that he felt the cage begin to sway and then the next thing he remembered he was on the ground covered in debris.

Plaintiffs' expert, Alden P. Gaudreau, PE, testified that he is the principal owner of a forensic engineering company and has been a licensed engineer in New York since 1983. Gaudreau formed his opinion, to a reasonable degree of engineering certainty, after visiting the site of the accident, reviewing reports, municipal records, photographs of the accident site, and the deposition

testimony of Earle L. Mallory, Dana Mallory, Alex Fridlyand, Tyler Silveira, Robert Mackey, Samuel Migliorelli, Gerald Krupa, and Robert Krupa. He opined, inter alia, that the pole barn collapsed due to its improper bracing. Specifically, among other things, he stated that the blocking that was used to hold the trusses in place was insufficiently short and should have been continuous, and the temporary post bracing was removed prematurely. He also determined that Mallory was not provided with adequate protection like lanyards, safety harnesses, or body belts to be utilized when performing his assigned work from that elevation since he would not be thrown from the cage and hit with debris as the lift toppled due to being struck by the collapsing roof.

Here, where the scissor lift topples over and plaintiff is struck by falling debris, there is a presumption that plaintiff was not given adequate safety devices, and it is incumbent on the defendants to establish that the plaintiff's own acts or omissions were the sole cause of the accident (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287 [1st Dept 2008] citing *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 289 [2003]; *Cammon v City of New York*, 21 AD3d 196 [1st Dept 2005](summary judgment appropriate where safety devise could have prevented dislodging timber from striking him from above); *Lin v 100 Wall Street Property LLC*, 192 AD3d 650 [1st Dept 2021]; *Prenty v Cava Construction Co.*, 289 Ad2d 120 [1st Dept 2001]). At a minimum, with respect to Mallory's recalcitrance, there is no dispute that he was expected to use a safety lanyard or harness and refused to do so for no good reason (*id.*)(generic statements that safety devices were available are insufficient to create an issue of fact).

Further, even if a scissor lift constituted a generally adequate safety device, its availability alone will not absolve a defendant from absolute liability where "the device alone is not sufficient to provide safety without the use of additional precautionary devices or measures" (*Nimirovski v Vornado Realty Trust Co.*, 29 Ad3d 762 [2d Dept 2006](where foreseeable that dropping pieces

of metal could strike scaffold and cause it to shake, the scaffold was inadequate on its own to protect plaintiff without additional safety devices); *DelRosario v United Nations Fed. Credit Union*, 103 AD3d 515 [1st Dept 2013](ladder was inadequate to prevent fall when came into contact with exposed wire during construction of new building); *Prenty*, 289 AD2d 129). Where no device is provided to protect the plaintiff from a fall through an open, elevated area, summary judgment must be granted to plaintiff as a matter of law (*see Felker v Corning Inc.*, 90 NY2d 219 [1997] citing *Gordon v Eastern Ry. Supply*., 82 NY2d 555 [1993]).

In opposition, defense counsel's unsupported, conclusory non-expert assertion that no safety device would have protected plaintiff Mallory from the barn collapsing is insufficient to raise a triable issue of fact. Moreover, defendants' argument that the collapse of the barn cannot serve as a basis for liability pursuant to § 240(1) unless its collapse was foreseeable relies on cases, as plaintiffs put it, which are horses of another color. Those cases cited by the defendants pertain to the collapse of completed and permanent structures, whereas in this case the not fully secured barn was still under construction. Additionally, since the whole point of plaintiff Mallory's task was to secure the roof to the barn during its construction, its collapse was foreseeable (*see Lin*, 193 AD3d 650; *compare Jones v 414 Equities LLC*, 57 AD3d 65 [1st Dept 2008]; *Morera v New York City Tr. Auth.*, 182 AD3d 509 [1st Dept 2020]). Thus, that branch of plaintiffs' summary judgment pursuant to Labor Law § 240(1) is granted and the corresponding branch of the cross motion is denied.

Accordingly, it is ORDERED that defendants' cross motion for summary judgment is granted to the extent that plaintiffs' complaint is dismissed as to Alex Fridyland, individually; and it is further

ORDERED that defendants' cross motion is granted to the extent that plaintiffs' Labor Law § 200 claim is dismissed as to Vallis; and it is further

ORDERED that plaintiffs' motion for summary judgment is granted with respect to the cause of action based on Labor Law§ 240(1); and it is further

ORDERED that the remainder of the motion and cross motion are denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of this Court.

1/13/2022
DATE

RICHARD LATIN, J.S.C.

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