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| Olmann v RCB, Nominee, LLC |
| 2022 NY Slip Op 31487(U) |
| May 9, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 152429/2018 |
| Judge: Frank P. Nervo |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART IV

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DANIEL OLMANN,

Index No. 152429/2018

Plaintiff,

-against-

RCB_I NOMINEE, LLC, TISHMAN CONSTRUCTION
CORPORATION, and TISHMAN CONSTRUCTION

**DECISION AND
ORDER**

Defendants,

Mot. Seq. No. 005

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RCB_I NOMINEE, LLC, TISHMAN CONSTRUCTION
CORPORATION, and TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK,

Third-Party Plaintiffs,

-against-

FRED GELLER ELECTRICAL, INC.,

Third-Party Defendant.

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FRANK P. NERVO, J:

Plaintiff moves for partial summary judgment pursuant to CPLR § 3212 and the protections afforded by Labor Law § 240(1) against the owner of the property on which he was working, RCB_I Nominee LLC (hereinafter “RCB_I”), and the general contractor/construction manager, Tishman Construction Corporation (hereinafter “Tishman”). Defendants oppose the motion. Third-party defendant Fred Geller Electrical, Inc. (hereinafter “FGE”) submits

opposition on this motion for which it has not been noticed and, therefore, FGE's submissions (NYSCEF Doc. Nos. 178 and 179) are not considered.

Plaintiff alleges he was injured when a portion of a plywood deck collapsed under his weight and the weight of the steel rebar construction material he was carrying at the time for placement as part of the project. Plaintiff asserts the integrity of the plywood deck was compromised by the boring through it of a series of contiguous holes approximately six inches in diameter, a few inches apart. These holes are intended to accommodate the future installation of electrical conduit by third-party defendant FGE. Upon the collapse of this plywood under his weight and that of the material he was carrying, plaintiff fell through the plywood deck for some distance, as he described at page 98 line 8, of his deposition (NYSCEF DOC. 105) "My right foot, my right leg; everything on my right side went through. . ." and at page 99 line 24: "Only my right leg, and it went up to my thigh." Further, at page 102 line 6, in response to the inquiry ". . .[O]ther than your right thigh, did any other portion of your body make contact with the floor after you fell?" plaintiff testified: "Right side, my shoulder, my neck, my back" and at page 103, line 5: "Am I correct that your left leg was above the floor on top of the 38th floor at

that time [after your right foot fell through the compromised plywood deck]?

Yes, sir.” No contradictory evidence is present on this record.

It is undisputed that at the time of this incident plaintiff was engaged in his employment with a non-party contractor participating in the erection of a building, and therefore the Court finds plaintiff was engaged in an activity anticipated by Labor Law § 240(1). There is no dispute that defendant RCB_I was the owner of, and defendant Tishman was the general contractor at, the site. The defendants' arguments that: a) Labor Law § 240(1) is inapplicable as there was no attendant height differential; and, b) plaintiff's experience results from the ordinary hazards of a construction site are entirely, and equally, without merit.

It cannot be gainsaid there is no elevation between the floor the plaintiff was working on (here the 38th) and the one below it (presumably the 37th). That reality notwithstanding, here there was present both unprotected floor openings (the holes affirmatively created clear through the plywood as part of the construction of this building) and an obviously inadequate safety device of weakened plywood intended to prevent workers from falling through the floor to the level below. The fact that the safety device-plywood may well have been

adequate until its structural compromise by the drilling of holes through it, does not inure to the legal vindication of the defendants to the legal detriment of the injured worker plaintiff. Further, movant's assertion that this situation presented but a "small hole . . .at a minor elevation" and essentially a mere "ordinary hazard of a construction site" can best be charitably recognized as a view of the evidence not supported by the facts. Indeed, it would not be unfair to consider these circumstances as a trap created – perhaps unintentionally – into which the working plaintiff literally and figuratively fell. The undisputed facts surrounding the affirmative creation and thoughtless arrangement of a readily visually compromised safety-device, exemplify the significance of the protections afforded by Labor Law § 240(1). Here present is the proverbial accident-waiting-to-happen created literally at the feet of the plaintiff and his co-workers. The unrefuted facts and circumstances provide no basis in law or fact for the Court to deny plaintiff the protections afforded by Labor Law 240(1).

Consequently, it is:

ORDERED plaintiff's motion for partial summary judgment in his favor against the defendant owner RCBI and the general contractor Tishman,

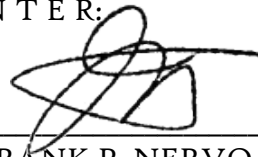
pursuant to the absolute liability protections afforded by Labor Law § 240(1) is

GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

New York, New York
May 9, 2022

ENTER:

A handwritten signature in black ink, appearing to be 'F. Nervo', written over a horizontal line.

FRANK P. NERVO,
Justice Supreme Court