SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 510411/2018
Motion Seq.: 02

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MAKHMUDJON KARIMJANOV and
SHAROFAT KARIMJANOV,

Plaintiffs,

DECISION AND ORDER

– against –

MARINE TERRACE HOUSING DEVELOPMENT
FUND CORPORATION and MONADNOCK
CONSTRUCTION, INC.,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion.

The following e-filed documents, listed by NYSCEF document number (Motion 02) 45-54, 68-72, 76-78, and 81-82 were read on this motion for summary judgment.

In this action to recover damages for personal injuries, the plaintiff moves for an Order granting partial summary judgment pursuant to CPLR § 3212 on the issue of liability under Labor Law § 240(1) against the defendants, Marine Terrace Housing Development Fund Corporation (Marine) and Monadnock Construction, Inc. (Monadnock). For the reasons set forth below, the motion is denied.

This action arises out of a construction site accident that occurred on March 23, 2018, when plaintiff Makhmudjon Karimjanov alleges that he fell from a scaffold and sustained injuries as a result. In support of their motion, the plaintiffs submit, inter alia, the pleadings, Mr. Karimjanov's deposition testimony, the deposition testimony of Monadnock superintendent David Pollack, and the expert affidavit of site safety manager Kathleen Hopkins. The plaintiffs allege that Mr. Karimjanov was working for non-party Agra Masonry Inc. at the time of the accident, which itself was hired as a subcontractor by general contractor Monadnock, and that Marine owns the premises at which the accident occurred.

Mr. Karimjanov testified that he was working on a facade of the subject building on the date and time of the accident. *See* NYSCEF Doc. No. 51. Mr. Karimjanov testified that he was working from atop a scaffold prior to his fall, which is where he had been directed to perform his duties as a bricklayer. *Id.* Mr. Karimjanov further testified that he had just applied cement and was about to place a brick atop the cement when his foot caught on a pipe, causing him to trip and fall through a window opening that extended approximately two feet about the scaffold planks, and that he fell approximately five or six feet down to the windowsill below. *Id.* Mr. Karimjanov further testified that the pipe was connected to the building to help to keep the scaffold from falling, and that the width of the scaffold platform was approximately two feet. *Id.*

Mr. Karimjanov testified that although he was wearing a safety harness, the harness was not attached to anything, nor was there anything on which he could attach it. *Id.* He also testified that there was no railing on the scaffold. *Id.* Mr. Karimjanov testified that he fell on his head, shoulder and arm at approximately the same time. *Id.*

The plaintiffs also submit the expert affidavit of Kathleen Hopkins, who states that she is a Certified Site Safety Manager with over 40 years' experience in safety, health, and environmental management in the construction industry. *See* NYSCEF Doc. No. 47 at pg. 1. Ms. Hopkins further states that her areas of specialty include construction site accident investigations, hazard analysis, and causation. *Id.* Ms. Hopkins states that although the bracket scaffold at issue was required to be provided with safety railings, no railings were present on the scaffold before Mr. Karimjanov was directed to use it. *Id.* at pg. 4. Ms. Hopkins further asserts that Mr. Karimjanov should have been provided with a safety harness, lanyard, anchorage point, and/or other such devices to protect Mr. Karimjanov from height-related risks. *Id.* As a result, Ms. Hopkins states that she can opine with a reasonable degree of professional safety certainty that the defendants failed to provide safe scaffolding, ropes, and/or other devices which would give proper protection to Mr. Karimjanov, and that this failure was a direct and proximate cause of Mr. Karimjanov's injuries. *Id.* at pgs. 4-5.

The defendants oppose the motion and submit a copy of the accident report, drawings and specifications of the window through which Mr. Karimjanov alleges he fell, medical records, and the expert affidavit of Robert Bove, Ph.D., a Senior Manager with Exponent, Inc., which is an engineering and scientific consulting firm. The defendants argue that the plaintiff's version of events cannot have happened as alleged and assert that the dispositive issue in this matter is not the legal significance of a fall from a scaffold under the Labor Law, but rather whether the plaintiff actually fell off of the scaffold at all. Defendants refer to the testimony of Monadnock superintendent David Pollack, who testified that although the plaintiff's accident occurred on a Friday, the accident was not reported to Monadnock until the following Monday. *See* NYSCEF Doc. No. 68. Mr. Pollack, who prepared an accident report, testified that he was told that Mr. Karimjanov tripped and fell on a tieback or strut, braced himself for the fall, and injured his wrist as a result. *Id.* Mr. Pollack also testified that he believed it would be unlikely that the fall occurred as the plaintiff now alleges it did. *Id.*

The defendants also rely upon the affidavit of Dr. Robert Bove, who states that he earned his Ph.D. in Bioengineering in 2003, and that his practice focuses on injury biomechanics with an emphasis on kinematics and human tolerance to mechanical forces. *See* NYSCEF Doc. No. 72. Dr. Bove states that the plaintiff's injuries are more consistent with a fall onto an outstretched hand rather than a fall through a scaffold. *Id.* Dr. Bove asserts that the plaintiff's fall could not have resulted in him making contact with the ledge, and that the plaintiff's momentum would have carried him further inward to the building. *Id.*

The plaintiffs filed a reply and submitted the witness affidavit of Salohiddin Namozov, who was also employed as a mason and bricklayer by Agra Masonry Inc. The plaintiffs contend that the defendants failed to create an issue of fact in opposition because their arguments rely upon speculation and inadmissible hearsay. The plaintiffs contend that the defendants' expert, Dr. Bove, did not opine that the accident did not happen as Mr. Karimjanov alleges, but rather

that Mr. Karimjanov's accident was merely "unlikely" to have occurred as he alleges it did. Plaintiffs further contend that Dr. Bove's affidavit is unreliable because: 1) he never visited the jobsite; 2) he relied on documents and other information not in evidence; and 3) he relied on pictures taken days after the accident, after the jobsite was altered, and which did not depict the critical areas about which he opined, namely the scaffold planking and the unguarded opening through which Mr. Karimjanov fell. Plaintiffs also argue that Dr. Bove's assertions are conclusory because he did not provide any of the calculations on which he purports to have relied.

The proponent of a summary judgment motion must make a prima facie showing of entitlement as a matter of law and submit sufficient admissible evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Labor Law § 240(1) imposes a nondelegable duty to protect workers from elevation-related hazards while they are conducting certain enumerated work activities. The statute provides in relevant part:

> All contractors and owners and their agents in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect 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 Court of Appeals has repeatedly held that Labor Law § 240(1) must be construed liberally. *See Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993). However, this principle is to be applied only after a violation of the statute has been established. *See Narducci v Manhasset Bay Assocs.*, 96 NY2d 259 (2001). In order to impose absolute liability under Labor Law § 240(1), the plaintiff must show that the owner or general contractor's failure to provide proper protection to workers employed on a construction site proximately caused injury to a worker. *See Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 (2011). "Whether a plaintiff is entitled to recovery under the statute requires a determination of whether the injury is the type of elevation-related risk to which the statute applies." *Id.* at 3.

In the instant matter, the Court finds that the plaintiff has demonstrated its prima facie entitlement to judgment as a matter of law with regard to its Labor Law § 240(1) claims, as the plaintiff established through his deposition testimony that his injuries resulted from a fall from a scaffold. The plaintiff also demonstrated, through the affidavit of Kathleen Hopkins, that the subject scaffold was not properly outfitted with safety devices such as a lanyard or an anchorage point. However, in opposition, the defendants raised a triable issue of fact through its own expert's affidavit, as Dr. Bove concluded that Mr. Karimjanov's fall could not have occurred in the manner he alleges. *See Loretta v Split Development Corp.*, 168 AD3d 823 (2d Dept 2019) (although plaintiff established its entitlement to judgment as a matter of law by demonstrating that the defendant's failure to provide the plaintiff with an adequate safety device proximately

caused his injuries, the plaintiff's motion for summary judgment was properly denied because the defendant raised triable issues of fact regarding the manner in which the accident occurred). Dr. Bove concluded that it is unlikely that a person of plaintiff's height and weight could fall through a window opening in the manner the plaintiff described at his deposition. To the extent that the plaintiff seeks to rely upon the witness affidavit of Salohiddin Namozov, this evidence was submitted for the first time in reply and is therefore not properly before the Court. *See Lee v Law Offices of Kim & Bae, P.C.*, 161 AD3d 964 (2d Dept 2018). As such, triable issues of fact remain with regard to the manner in which plaintiff fell and, accordingly, whether his injuries were proximately caused by the defendants' alleged failure to provide proper protection to him. *See Wilinski*, 18 NY3d at 6 (2011).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1) (Motion 02) is DENIED.

This constitutes the decision and order of the Court.

DATED: May 6, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.