

Lopez v 40-50 Brighton First Rd. Apts. Corp.
2022 NY Slip Op 31847(U)
June 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 514851/19
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of June, 2022.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

-----X

SANDY LOPEZ, JR.,

Plaintiff,

-against-

Index No.: 514851/19

40-50 BRIGHTON FIRST ROAD APARTMENTS
CORP., TKR PROPERTY SERVICES, INC., and
S.I. VICTORY CONSTR. & DEV. CORP.,

Defendants.

-----X

S.I. VICTORY CONSTR. & DEV. CORP.,

Third-Party Plaintiff,

-against-

ROCK GROUP NY CORP.,

Third-Party Defendant.

-----X

40-50 BRIGHTON FIRST ROAD APARTMENTS
CORP. and TKR PROPERTY SERVICES, INC.,

Second Third-Party Plaintiff

-against-

ROCK GROUP NY CORP.,

Second Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>107-122, 124-133</u> .
Opposing Affidavits (Affirmations)_____	<u>137-138, 140, 142-145</u>
Affidavits/ Affirmations in Reply _____	<u>141, 147-149</u> .
Other Papers: _____	_____

Upon the foregoing papers, plaintiff Sandy Lopez Jr. (plaintiff) moves (M.S.6) for an order, pursuant to CPLR 3212, granting summary judgment as to liability on his claims arising under Labor Law § 240 (1) as asserted against defendant/second-third-party plaintiff 40-50 Brighton First Road Apartments Corp., (40-50 Brighton), and as against defendant/third-party plaintiff S.I Victory Construction and Development Corporation (S.I. Victory).

S.I Victory cross-moves (M.S.7) for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff’s Labor Law § 240 (1) claim.

Background and Procedural History

40-50 Brighton is the owner of premises located at 40-50 Brighton First Road in Brooklyn, New York. 40-50 Brighton retained S.I. Victory as the general contractor for a construction project involving the façade at the building (the project). S.I Victory entered into a subcontract with third-party defendant/second third-party defendant Rock Group NY Corp. (Rock) to perform work on the project including the installation of a sidewalk bridge. Rock subcontracted with LJ Installation Corp., (LJ) to install the sidewalk bridge. Plaintiff, who was employed by LJ, testified that his job duties included assembling and

disassembling sidewalk bridges and scaffolding. On April 15, 2019, plaintiff arrived at the premises to assist in the installation of sidewalk bridges. He testified that there was a truck at the premises when he arrived containing the materials needed to perform this task. Plaintiff stated that the sidewalk bridges consisted of three main components: 27 foot long beams, 12 to 14 foot long legs, and girders. Two legs would be attached to each beam on the ground at street level and that the beam would ultimately be supported horizontally in the air by the legs that would stand vertically. Plaintiff further testified that upon connecting the legs to the beam, plaintiff and four of his co-workers lifted the beam into an upright position. Then the legs were connected to each other with girders, to ensure that the entire structure remained upright on its own. Plaintiff stated that the legs and the beam needed to be manually supported until the girders were attached to the legs. In order to accomplish this, plaintiff stood on the bed of the truck that had delivered the material, which was approximately six feet off of the ground, while his coworkers stood atop a scaffold to hold the beams. As plaintiff was attempting to connect the girders to the legs, the scaffolding collapsed and the beam, which he testified was approximately 12-14 feet in the air, fell and struck him causing him to sustain injury. Plaintiff further testified that it was very windy on the day of his accident and that a gust of wind preceded the collapse of the scaffolding.

Plaintiff subsequently commenced this action against 40-50 Brighton, TKR Property Services, Inc., (TKR)¹ and S.I. Victory on July 8, 2019. 40-50 Brighton and TKR filed an answer on August 28, 2019, and S.I. Victory filed its answer on September 12,

¹ TKR is the property management company for 40-50 Brighton.

2019. S.I. Victory filed a third-party summons and complaint on September 12, 2019, against Rock, which filed its third-party answer on February 27, 2020. On or about March 11, 2020, 40-50 Brighton and TKR filed a second third-party summons and complaint against Rock, and its answer was filed on June 26, 2020. Depositions were held and plaintiff filed a note of issue on November 11, 2021, and the following timely motions ensued.

Plaintiff's Motion (MS-6) & S.I. Victory's Cross Motion (MS-7)

Plaintiff moves for summary judgment on the issue of liability on his Labor Law § 240 (1) claim as asserted against 40-50 Brighton and S.I. Victory. S.I. Victory cross-moves for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim as asserted against it.

Plaintiff argues that he is entitled to summary judgment in his favor on his Labor Law § 240 (1) claim against these defendants, as owner of the premises and general contractor for the project, based on the undisputed proof that the sidewalk bridge he was in the process of erecting, and the scaffold his co-workers were using to help erect the sidewalk bridge, collapsed and that a metal beam struck and injured him. Specifically, plaintiff asserts that the collapse was proximately caused by a violation of Labor Law § 240 (1) since the bracing of the structure was inadequate to prevent its collapse, and no safety devices were provided to him or his coworkers to prevent against the foreseeable risk that the scaffold would collapse given the windy weather condition. He maintains that his accident falls within the purview of Labor Law § 240 (1), as he was working at a height

of six feet and was struck by a beam that was approximately 12-14 feet above the sidewalk level.

In opposition, and in support of its' cross motion, S.I. Victory argues that plaintiff's motion should be denied as his testimony reveals that the sidewalk bridges were not yet installed at the time of the accident, thus, he was not injured as a result of falling from a sidewalk bridge or as a result of a scaffold collapse. Additionally, S.I. Victory contends that the beam that plaintiff contends struck him was located at the same level at which he was standing. S.I. Victory contends that inasmuch as plaintiff did not fall from a height, nor was he struck by an object falling from above, plaintiff's Labor Law § 240 (1) claim should be dismissed and his motion seeking summary judgment in his favor on this claim denied. Moreover, S.I. Victory argues that liability cannot be imposed upon it as the sudden, strong wind gust plaintiff testified about was an unforeseen intervening event. 40-50 Brighton, TKR, and Rock also oppose plaintiff's motion for the reasons stated in S.I. Victory's opposition.

In reply, plaintiff contends that the arguments raised by defendants are incorrect. He asserts that his injuries were caused by a violation of Labor Law § 240 (1), when the sidewalk bridge collapsed, and he was struck by a falling metal beam. Further, plaintiff argues that the falling beam from a height above where he was working presented a distinct elevation-related hazard that required the securing of the beam. Finally, he notes that S.I. Victory's argument that the winds were an unforeseen intervening factor is belied by the testimony of their own witness, Mr. Andrei Tsiarletski, who testified to the fact that April is typically pretty windy and that when scaffold work is to be performed, the weather is

checked frequently. Specifically, he testified that the day before the accident he had discussed the severe weather conditions with all owners and managers on the jobsite (NYSCEF Doc No. 120, Tsiarletski tr at p. 38, lines 10-26; p. 39, lines 2-17). However, plaintiff points out that Rock, the entity that hired his employer, was not on the jobsite the day before the accident occurred when the severe weather was discussed.

In reply to plaintiff's opposition to its cross motion, S.I. Victory notes that plaintiff does not dispute that he was not injured as a result of working on and falling off of a collapsing sidewalk bridge. S.I. Victory argues that plaintiff has failed to establish that he was injured as a result of an object falling from a physically significant elevation differential. S.I. Victory argues that the cases cited by plaintiff in support of this claim are distinguishable from the facts herein, noting that in each of the cited cases there was either a physically significant height differential or there was evidence that the weight of the object generated a significant amount of force. Here, S.I. Victory notes that plaintiff has failed to provide testimony on the weight of the beam that allegedly fell on him, and thus the court cannot speculate as to the force of the falling object to determine whether the height differential is significant enough to establish a violation of Labor Law § 240 (1).

Discussion

Labor Law § 240 (1)

Labor Law § 240 (1), states, in relevant part, that:

All contractors and owners and their agents, except owners of one and 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 purpose of Labor Law § 240 (1) is to protect workers “from the pronounced risks arising from construction work site elevation differentials” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*see Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2d Dept 2009], *lv dismissed* 13 NY3d 857 [2009]). The statute is designed to protect against “such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v DD 11th Ave., LLC*, 109 AD3d 604, 604-605 [2d Dept 2013], quoting *Ross*, 81 NY2d at 501).

The duty to provide the required “proper protection” against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*see Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [owner or contractor is liable for Labor Law § 240 (1) violation “without regard to . . . care or lack of it”]; *see Roblero v Bais Ruchel High` Sch., Inc.*, 175 AD3d 1446, 1447

[2d Dept 2019]). “To succeed on a cause of action under Labor Law § 240 (1), a plaintiff must establish that the defendant violated its duty and that the violation proximately caused the plaintiff’s injuries” (*id.*).

Plaintiff contends that his Labor Law § 240 (1) claim arises out of the collapse of both the sidewalk bridge he was in the process of constructing and the scaffold his co-workers were using to help erect the sidewalk bridge, as well as the metal beam falling from a height and striking him.

“To prevail on a motion for summary judgment in a Labor Law § 240 (1) “falling object” case, the plaintiff must demonstrate that at the time the object fell, it either was being hoisted or secured, or required securing for the purposes of the undertaking” (*Romero v 2200 N. Steel, LLC*, 148 AD3d 1066, 1067 [2d Dept 2017]; *see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; *Outar v City of New York*, 5 NY3d 731, 732 [2005]). “Labor Law § 240 (1) “does not automatically apply simply because an object fell and injured a worker; [a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute” (*Fabrizi*, 22 NY3d at 663, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

The Court of Appeals in *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, (18 NY3d 1 [2011]), determined that a plaintiff is not precluded from recovery under Labor Law § 240 (1) solely because the object that struck him or her was at the same level and that a short elevation differential between a worker and a falling object is not considered de minimis if the weight of the object and the force it is capable of generating on its descent is significant. As such, courts have imposed Labor Law § 240 (1) liability in circumstances

where either the plaintiff and the falling object were on the same level or the object traveled only a short distance before striking the worker (*see Kandatyan v 400 Fifth Realty, LLC*, 155 AD3d 848, 850 [2d Dept 2017]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 928-929 [2d Dept 2012] [holding that “although the base of the scaffold was at the same level as the plaintiff and the scaffold only fell a short distance, given the combined weight of the device and its load, and the force it was able to generate over its descent, this difference was not de minimis”]; *Pritchard v Tully Constr. Co., Inc.*, 82 AD3d 730 [2d Dept 2011] [court held that Labor Law § 240 (1) was violated when an unsecured motor, weighing 300 to 350 pounds, fell two to three feet onto the plaintiff who was standing beneath it]; *Gutman v City of New York*, 78 AD3d 886, 887 [2d Dept 2010] [where a rail fell on the plaintiff from approximately 12 to 16 inches, the court held that the elevation differential was not de minimis given the weight of the object and the amount of force it was capable of generating “even over the course of a relatively short descent”]; *see also Grigoryan v 108 Chambers St. Owner, LLC*, __ AD3d __, 2022 NY Slip Op 02620 [1st Dept 2022]; *Encarnacion v 3361 Third Ave. Hous. Dev. Fund Corp.*, 176 AD3d 627, 628 [1st Dept 2019]).

Here, plaintiff testified that he was standing on the bed of the truck, which was located approximately six feet off the ground, and that the beam that struck him was approximately 12-14 feet off the ground. However, there is nothing in the record before this court indicating what plaintiff’s height is, thus it cannot be determined what, if any, distance the beam fell before striking plaintiff. Significantly, although plaintiff testified that several workers were needed to lift the 27 foot long beam that he allegedly struck him,

there is nothing in the record definitively establishing the weight of the beam. In fact, plaintiff testified that he did not know the weight of the beam (NYSCEF Doc No. 118, plaintiff's tr, at p. 35, lines 24-25, p. 26, line 2). Accordingly, the court finds that questions of fact exist that preclude granting plaintiff summary judgment in his favor on his Labor Law § 240 (1) claim.

Similarly, the court finds that S.I. Victory fails to demonstrate its entitlement to summary judgment dismissing plaintiff's Labor Law 240 (1) claim (*see Hawver v Steele*, __ AD3d __, 2022 NY Slip Op 02322, 4 [3d Dept 2022] [holding that it was error to grant defendants' motion for summary judgment dismissing Labor Law § 240 (1) claim and that plaintiffs' cross motion for partial summary judgment as to said claim should be denied as the record was devoid of plaintiff's height, the weight of the doors, that struck him and how far the doors fell or the amount of force that the doors generated when falling]; *Bain v 50 W. Dev., LLC*, 191 AD3d 496, 497 [1st Dept 2021] [court found question of fact regarding whether Labor Law § 240 (1) was violated where the weight of the object that fell on plaintiff was not known]; *Wright v Ellsworth Partners, LLC*, 143 AD3d 1116, 1119 [3d Dept 2016] [court held that summary judgment on plaintiff's Labor Law § 240 (1) claim was not appropriate where there was no information in the record regarding plaintiff's height or the number of scaffolds stacked in the pile that collapsed, and the weight of each scaffold]). Additionally, the court finds questions of fact exist regarding whether the beam required securing for the purpose of the undertaking (*see Saber v 69th Tenants Corp.*, 107 AD3d 873, 876 [2d Dept 2013]; *Portillo v Roby Anne Dev., LLC*, 32 AD3d 421, 422 [2d Dept 2006]).

To the extent not specifically addressed herein, the parties' remaining contentions and arguments were considered and found to be without merit and/or moot. Accordingly, it is

ORDERED that plaintiff's motion seeking summary judgment as to liability on his Labor Law § 240 (1) claim as asserted against 40-50 Brighton and S.I. Victory is denied; and it is further

ORDERED that S.I. Victory's motion seeking summary judgment dismissing plaintiff's Labor Law § 240 (1) claim is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.