SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** 11M

Justice

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WILLIAM ARIAS,

Plaintiff,

- v -

139 EAST 56TH STREET LANDLORD LLC,HUNTER ROBERTS CONSTRUCTION GROUP, LLC,

Defendant.

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INDEX NO. 162213/2018

MOTION DATE 05/04/2022, 05/04/2022

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

HUNTER ROBERTS CONSTRUCTION GROUP, LLC

Plaintiff,

-against-

TITAN INDUSTRIAL SERVICES CORP.

Defendant.

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Third-Party
Index No. 595422/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 72, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 76, 85

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

Upon the foregoing documents, plaintiff's motion for summary judgment is denied and defendants, 139 East 56th Street Landlord, LLC and Hunter Roberts Construction Group, LLC's, motion for summary judgment is granted in part.[1].

[1] The Court would like to thank Joyce D. Campbell Priveterre, Esq. for her assistance in this matter.

Facts

On December 15, 2017, plaintiff, then an employee of Titan Industrial Services (Titan), a sub-contractor retained by defendant general contractor Hunter Roberts Construction Group, LLC (Hunter), to provide demolition work at two buildings located at 139 East 56th Street, New York City, was injured when he lost his balance and fell while attempting to cut through a wood beam. Plaintiff further alleges that he sustained injuries to his extremities, including his right arm.

Summary Judgment Standard

Courts have held that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978) *citing Moskowitz v. Garlock*, 23 A.D.2d 943. However, only the existence of a *bona fide* issue raised by evidentiary facts and not conclusory allegations will suffice to defeat summary judgment. *See Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 N.Y.2d 285, 290, 344 N.Y.S.2d 925, 929; *Rosenberg v. Del-Mar Div., Champion Int. Corp.*, 56 A.D.2d 576, 577, 391 N.Y.S.2d 452-453.

Labor Law § 240(1)

It is well established law that "an accident alone does not establish a Labor Law § 240 (1) violation or causation." (*Blake v Neighborhood Hous. Servs. of NY City, Inc.*, 1 NY3d 280, 289 [2003]). Rather, plaintiff must show that a safety mechanism failed in order to establish liability pursuant to Section 240(1). *See* id.

Plaintiff's Motion for Summary Judgment

Plaintiff contends that although he was provided with a safety harness that, he concedes, was properly anchored at the time of his fall, this device did not protect him from an elevated-

related risk and, thus, *ipso facto*, defendants are liable for his injuries. In support of his argument, plaintiff cites to several First Department cases for this proposition. However, the Court finds them unavailing and largely distinguishable from the facts at bar.

Rubio v New York Proton Mgt., LLC, is on its face inapposite since the defendants, unlike in the case at bar, presented no evidence that the safety device, unsecured plywood upon which plaintiff was walking when he fell, provided adequate protection. 192 A.D.3d 438, 439 (1st Dept 2021). Moreover, unlike the *Rubio* defendants, who argued that a harness was readily available although not used, the plaintiff at bar had been equipped with a safety harness. *See* NYSCEF Doc. 48 at page 48, lines 6-23. Similarly, the facts presented in *Magee v 438 E. 117th St. LLC* differ considerably from the facts at bar insofar as the *Magee* plaintiff was provided with no safety devices whatsoever. 56 A.D.3d 376, 377 (1st Dept 2008).

Plaintiff relies upon the holding in *Gomez v Trinity Ctr. LLC* for the proposition that although the *Gomez* plaintiff sustained injuries from a fall while harnessed, the Court nevertheless held that a *prima facie* violation of Labor Law 240 (1) was established. 195 A.D.3d 502 (1st Dept 2021). However, plaintiff's reliance upon this holding conspicuously fails to mention that the defendant in *Gomez* failed to raise an issue of fact as to whether plaintiff had been the sole proximate cause of his injuries. The *Gomez* court found that defendant's expert opinion was vague and made no mention of evidence in the record. Conversely, defendants submitted an Affidavit from Bernard P. Lorenz, P.E., who stated that in his expert opinion, plaintiff's assertion that his accident could have been prevented by an alternative mode of demotion, or the use of scaffold or netting, was entirely speculative. *See* NYSCEF Doc. 59 at page 6, paragraph 13.

It appears that plaintiff's reliance upon the holding in *Cross v CIM Group, LLC* is wholly predicated upon the fact that both plaintiffs fell. 154 A.D.3d 432 (1st Dept 2017). However, the

decision does not provide sufficient facts to establish upon what, if any, basis the defendant may have rebutted plaintiff's allegations. Accordingly, the decision is unavailing.

The defendants in *Stigall v State of New York* were held to have provided plaintiff with a safety cable that was set up too low which resulted in plaintiff falling before his lanyard could be deployed. 189 A.D.3d 469 (1st Dept 2020). The *Stigall* court was satisfied that there was no triable issue of fact as to whether the slack in the lanyard was the proximate cause of plaintiff's injury. *Id.* at 470. However, at bar, there is no dispute that plaintiff's harness functioned as intended. Plaintiff testified that he was required to ensure that the anchor for his harness was secure and he did so on the date of his accident. *See* NYSCEF Doc. 48 at page 129, lines 13-25.

Plaintiff cites to the holding in *Felker v Corning, Inc.*, which found that although plaintiff could not remember the accident, the Court of Appeals held that there was nonetheless no issue of fact concerning defendant's liability. 90 N.Y.2d 219 (1997). However, this case is initially distinguishable from the case at bar because the *Felker* plaintiff was provided no safety device. *Id* at 225. The *Felker* court's finding that the complete absence of a safety device was the proximate cause of the accident is unavailing where both plaintiff and defendant in the case at bar agreed that there has been no evidence that his harness was defective and where material facts differ as to whether the harness provided adequate protection.

In *Kyle v City of New York*, plaintiff, though harnessed and anchored, fell through an open, elevated area. 268A.D.2d 192 (1st Dept 2000). The *Kyle* decision specifically referenced the issue of the inadequacy of a safety device and the requirement that said inadequacy be the proximate cause of plaintiff's fall. *Id.* at 196.

However, defendants at bar point to inconsistencies in the record about whether plaintiff actually fell to the ground. Plaintiff testified that after he began sawing a beam, he felt some force

pulling him downward, but he could not recall what happened immediately thereafter. *See* NYSCEF Doc. 48 at page 82, lines 17-23. Plaintiff also testified that he fell approximately 15 feet. *See* NYSCEF Doc. 48 at page 91, lines 10-11. Plaintiff's co-worker, Johnny Cedillo, submitted an Affidavit wherein he stated that while he did not observe plaintiff when he first started to fall, he did see plaintiff falling toward the floor where Mr. Cedillo was standing. *See* NYSCEF Doc. 52 at page 3, paragraph 5.

However, the incident report prepared by Hunter states "The injured party was bending over his feet and cutting the floor joist approx. 16" in front of his feet when the saw jammed and pulled the injured party forward over the edge of the deck he was working on. The retractable locked preventing the fall to the floor below, however the injured party struck his head on a previously removed joist that had been leaning on the wall below him." *See* NYSCEF Doc. 66 at page 2.

Thus, unlike the defendants in *Kyle*, defendants at bar have credibly argued the existence of a material issue of fact concerning whether plaintiff was injured when he hit his head on a joist, or whether he was injured by hitting the ground. Moreover, where there are material issues of fact as to how plaintiff was injured, there necessarily are material issues of fact concerning whether the purported inadequacy of safety devices provided to plaintiff were the proximate cause of his injury.

Plaintiff argues that it is of no import how he fell because he did fall and that is the only predicate required to bring plaintiff's claims within the ambit of Labor Law § 240 (1). However, summary judgment is precluded where there is any doubt as to the existence of a triable issue.

Accordingly, with respect to Labor Law § 240 (1), plaintiff's motion for summary judgment is denied.

Defendants' Motion for Summary Judgment

As an initial matter, a search of the record by the Court notes that there is no opposition to the dismissal of plaintiff's Labor Law § 200 and §241(6) causes of action. Accordingly, those parts of plaintiff's case are dismissed.

Defendant argues that the plaintiff was provided with a safety harness that functioned as intended based upon plaintiff's own statements that he did not fall to the flooring below. Defendant also avers that even plaintiff's deposition testimony that he did not remember what happened after he felt a force pulling him below does not undercut his statement that the lanyard prevented his fall. This is selective reading of the facts adduced at bar.

Plaintiff's co-worker, Johnny Cedillo submitted an Affidavit which unambiguously states that he witnessed plaintiff fall from the flooring above Mr. Cedillo to the flooring below where Mr. Cedillo was standing. *See* NYSCEF Doc. 52 at page 3, paragraph 5. This testimonial is sufficient to raise a material issue of triable fact.

Moreover, defendants' reliance upon their expert opinion's finding that the safety devices provided to plaintiff were adequate is belied by the findings set forth in Hunter's own Incident Report, to wit: "…The retractable locked preventing the fall to the floor below, however the injured party struck his head on a previously removed joist that had been leaning on the wall below him." *See* NYSCEF Doc. 66 at page 2. Defendants' attempt to use the incident report as both sword, emphasizing the observation that plaintiff's retractable prevented his fall, and shield, noting that plaintiff hit his head on a joist, actually serves to amplify the existence of a material fact concerning the adequacy of the harness and lanyard.

Lastly, defendants aver that the safety devices were not the proximate cause of plaintiff's accident based upon evidence that plaintiff was injured when he came into contact with the wood joist. Assuming, *arguendo*, that the joist caused plaintiff's injury, there are facts at bar that support

plaintiff's contention that but for the fall he would not have hit the wood joist. Defendants further argue that plaintiff's fall was caused by the unforeseeable consequence of his saw jamming and causing him to fall forward. However, it strains credulity to suggest that falling from an elevated height, no matter the cause, could be construed as unforeseeable. Because of the material issues of fact regarding what precipitated plaintiff's fall, how he fell and whether the harness and lanyard provided him with adequate protection, summary judgment is inappropriate. Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied as to plaintiff's Labor Law § 240(1) claims; and it is further

ORDERED that plaintiff's motion for summary judgment pursuant to Labor Law §240(1) is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted as to plaintiff's Labor Law §§200 and 241(6) claims, and those claims are hereby dismissed.

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8/3/2022
DATE

LYLE E. FRANK, 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