SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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VICTOR GONZALEZ,

Plaintiff,

- v -

425 PARK OWNER LLC,TISHMAN CONSTRUCTION CORPORATION

Defendants.

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INDEX NO. 158603/2018

MOTION DATE 08/10/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for CONSOLIDATE & SUMMARY JUDGMENT.

BACKGROUND

That this is an action to recover damages for personal injuries sustained by Plaintiff as a result of Defendants' alleged negligence and pursuant to §§ 240(1) and 241(6) of the Labor Law of the State of New York. These actions stem from a construction accident that occurred on August 29, 2018, at the construction site located at 425 Park Avenue, New York, New York. Action No. 1 was commenced against 425 Park Owner LLC and Tishman Construction Corporation on September 17, 2018, and Action No. 2 was commenced against T-C Park Avenue, LLC, the owner of the Subject Premises on the date of the accident, on July 22, 2021. The Defendants in each action are represented by the same attorney.

PENDING MOTION

On June 10, 2022, Plaintiff moved for an order pursuant to CPLR §602(a) granting consolidation of both actions, on the ground that each of the matters involve common questions of law and fact, and upon consolidation, pursuant to CPLR §3212 granting Plaintiff summary

judgment, against Defendant T-C Park Avenue, LLC, pursuant to §§ 240(1) and 24l(6) of the Labor Law of the State of New York and setting the case down for an immediate assessment of damages.

On August 10, 2022, the motion was marked submitted and the court reserved decision. For the reasons stated below, the motion is granted to the extent of ordering consolidation of the actions and granting Plaintiff summary judgment as to liability.

ALLEGED FACTS

Plaintiff was involved in an accident on August 29, 2018, while working on a construction site located at 425 Park Avenue, New York, New York. Plaintiff was working as a laborer for Laquila at the time of his accident.

On the morning of the accident, Plaintiff's supervisor, Danny, instructed Plaintiff to go to the basement and clean up cement debris. Plaintiff was working in the basement by himself and Mr. Ramone Torres, one of Plaintiff's coworkers, was working above Plaintiff on a platform. The base of the platform was approximately ten feet high. As Plaintiff was working in the basement, he was struck by a falling metal object.

Immediately prior to being struck, Plaintiff was able to see the object that struck him as it was falling. The object that hit him was a temporary steel panel that was placed against the wall during the pouring of the concrete. Once the concrete was cured, the temporary steel panel had to be removed from the wall. The steel panel that struck Plaintiff was very heavy and knocked him to the ground.

There were no warning signs, caution tape, barriers, or anything else indicating that Plaintiff should not have been in the area where his accident occurred. While standing on the

platform more than ten-feet above Plaintiff's head, Mr. Ramone Torres was using a pry bar to pry the metal panels off the wall.

Materials had consistently fallen from the wall, including discarded pieces of plywood, cement, sticks, and pieces of wood two-by-fours that were used to set the concrete in place. There was no overhead netting or any other safety devices above Plaintiff to prevent objects from falling off the wall and striking him.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324).

"[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not

to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

The Motion for Consolidation is Granted without Opposition

A motion to consolidate actions pursuant to CPLR §602(a) on the basis that they involve common questions of law and fact is addressed to the sound discretion of the trial court. *Dukhvalov v. Pshierer*, 15 A.D.3d 334 (2nd Dept. 2005).

CPLR §602(a) provides:

> When actions involving a common question of law and fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.

It is not disputed that these two actions involve common questions of law and fact, as such the motion to consolidate is appropriate. Consolidation will promote judicial economy and prevent divergent decisions. *Chinatown Apartments, Inc. v. New York City Transit Authority*, 100 A.D.2d 824, 825 (1st Dept. 1984).

Based on the foregoing the motion to consolidate is granted.

Plaintiff Is Entitled to Summary Judgment Pursuant to Labor Law §240(1)

Section 240(1) of the Labor Law provides:

> All contractors and owners and their agents engaged 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, stings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated so as to give proper protection to a person so employed.

Section 240(1) was enacted for the protection of workers engaged in certain dangerous employment. *Lagzdins v. United Welfare Fund-Security Division Marriott Corporation*, 77 AD2d 585 (2d Dept. 1980).

Labor Law § 240(1) has long been regarded as an absolute liability statute pursuant to which an injured, protected worker may recover without establishing "fault" on the part of the owner or contractor. *Koenig v Patrick Constr. Co.*. 298 N.Y. 313 (1948). In order to prevail in a § 240 case, Plaintiff must prove (1) that he is a member of the class of workers that the statute was designed to protect, (2) that the statute was violated and (3) that the breach of the duties imposed by the statute was the proximate cause of plaintiff's injuries. *Koenig, supra; Harmon v. Sager*, 106 AD2d 704 (3rd Dept. 1984); *Crawford v. Leimzider*, 100 AD2d 568 (2nd Dept. 1984).

In *Rocovich v. Consolidated Edison Co*., 78 N.Y.2d 509, 514 (1991), the Court of Appeals held that liability under the statute would be applied only in cases arising from "risks related to elevation differentials." The *Rocovich* holding was reiterated the following year in *Ross v. Curtis-Palmer Hydro Electric Co*., 81 N.Y.2d 494 (1993), which added that Labor Law § 240(1) liability was limited to "those types of accidents in which the scaffold, hoist, stay, ladder, or other protective device proved inadequate to shield the worker from harm directly flowing from the application of the force of gravity to an object or person."

In *Passes v. Noble Construction Group, LLC*, 169 A.D.3d 706 (2nd Dept. 2019), a case with similar facts to the case at bar, the plaintiff was injured when a piece of plywood fell from the ceiling where formwork was being disassembled and struck the plaintiff. The Second Department ruled that the defendants violated New York Labor Law § 240(1), holding:

> Here, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony and the affidavit of a coworker who witnessed the accident. These submissions established that the plaintiff was hit by an unsecured four-by-eight-foot plywood sheet that fell from the first-floor ceiling onto the plaintiff as he was walking underneath (see Escobar v. Safi, 150 A.D.3d at 1083, 55 N.Y.S.3d 350; Carrion v. City of New York, 111 A.D.3d 872, 873, 976 N.Y.S.2d 126). In his affidavit, the coworker stated that approximately 20 to 30 minutes before the accident, a Genuine worker had removed the vertical post supporting the plywood sheet and left

> the plywood sheet unsecured in the ceiling. The coworker further stated that there was no caution tape surrounding the perimeter to prevent other workers from entering the area where the formwork disassembly was occurring.

In another case, the Appellate Division, First Department found summary judgment appropriate where a worker was injured when an 80-pound stone ornament fell from the fifth floor of a building during demolition. The Court held "(t)he falling of a heavy object from a height of five stories upon a worker employed at a demolition site is precisely the sort of extraordinary clavation-related event that Labor Law § 240(1) was intended to address [*Beauchesne v. City of New York*, 261 A.D.2d 145 (lst Dept. 1999)]."

Contrary to Defendants' argument that Labor Law §240(1) is inapplicable where a falling object is not being hoisted or secured, the Court of Appeals specifically held that falling object liability under Labor Law §240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured. Labor Law §240(1) liability is established as a matter of law upon proof that the statutorily designated defendants failed to furnish devices necessary to secure "an object that required securing for the purposes of the undertaking…" *Outar v. City of New York*, 5 N.Y.3d 731, 732 (2005); *Quattrocchi v. F.J. Sciame Construction Corp*., 11 N.Y.3d 757, 759 (2008).

Consistent with the Court of Appeals' holdings, the First Department has upheld summary judgment in favor of plaintiffs struck by unsecured or inadequately secured materials and falling objects, regardless of whether they were being hoisted or secured when they fell. *See Medouze v. Plaza Construction LLC*, 199 A.D.3d 465 (1st Dept. 2021); *Mayorga v. 75 Plaza LLC*, 191 A.D.3d 606 (1st Dept. 2021); *Franco v. 1221 Ave. Holdings, LLC*, 189 A.D.3d 615 (1st Dept. 2020); *Hill v. Acies Group, LLC*, 122 A.D.3d 428, 429 (1st Dept. 2014); *Zuluaga v.*

P.P.C. Construction, LLC, 45 A.D.3d 479 (1st Dept. 2007); *Campanella v. St. Luke's Roosevelt Hospital*, 247 A.D.2d 294 (1st Dept. 1998).

Moreover, an injured plaintiff need demonstrate neither how a load that required securing was inadequately secured nor even the defect that caused the object to fall. *See Gallegos v. Bridge Land Vestry, LLC*, 188 A.D.3d 566, 567–568 (1st Dept. 2020).

Defendants, in opposition, offer no admissible evidence to dispute Plaintiff's version of events or show that T-C 425 Park Avenue, LLC furnished safety devices to secure the panel properly and safely (e.g., with ropes, straps, or cables to prevent the panel from falling from the wall).

In their opposition papers, Defendants argue that an unauthenticated and unsigned incident report demonstrates that the panel was not being worked on at the time of the accident, so that falling object liability under Labor Law §240(1) should not be applied. The Court does not agree that the incident report makes such a statement, in the description of the workers activity at the time of the incident, the report in fact seems to imply that the area of panels was being worked on at the time. Assuming *arguendo* the report said different it would still be insufficient to create a question of fact requiring the denial of Plaintiff's motion. While hearsay statements may be used to oppose a summary judgment motion, such evidence is insufficient to warrant a denial of the motion where it is the only evidence submitted in opposition. *Taylor v. One Bryant Park, LLC*, 94 A.D.3d 415, 416 (1st Dept. 2012); *Rivera v. GT Acquisition 1 Corp.*, 72 A.D.3d 525, 526 (1st Dept. 2010).

Based on the foregoing, Plaintiff's motion for summary judgment as to liability pursuant to Labor Law §240(1) is granted.

Plaintiff is Entitled to Summary Judgment Pursuant to Labor Law §241(6)

Section 241(6) of the New York State Labor Law provides:

> 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. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not control the work, shall comply therewith.

Labor Law §241(6) imposes a nondelegable duty upon owners and contractors 'to provide reasonable and adequate protection and safety' to all persons employed in areas in which construction, excavation, or demolition work is being performed (*See Rizzutto v. L.A. Wenger Contracting Co., Inc*., 91 N.YU.2d 343, 347 (1998); *Ross v. Curtis- Palmer Hydro-Elec. Co*., 81 N.Y.2d 494, 501-502 (1993). To prevail upon a Labor Law §241(6) claim, Plaintiff must establish that Defendants violated a regulation that sets forth a specific standard of conduct. (*Ross v. Curtis-Palmer Hydro-Elec. Co*., 81 N.Y.2d 494, 501-502 (1993).

Plaintiff predicates liability in this case on Industrial Code §23-1.7(a)(1), which is titled *Protection from general hazards* and provides:

> (a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.

Industrial Code §23-1.7(a) is sufficiently specific to support a Labor Law §241(a) claim. *Murtha v. Integral Construction Corp*., 253 A.D.2d 637, 639 (1st Dept. 1998); *Zuluga v PPC Const., LLC* 45 A.D.3d 479,480 (1st Dept. 2007).

In *Parrales v. Wonder Works Const. Corp*., 55 A.D.3d 579 (2nd Dept. 2008), the plaintiff was injured when a piece of wood fell from the fifth floor and struck him. At the time of his accident, plaintiff was assisting in demolition work in the building. The demolition work occurred on upper floors of the building and an old elevator shaft was being used as a chute for the disposal of debris. The plaintiff was assigned to remove debris from the bottom of the shaft. As he was performing his duties at the bottom of the shaft, he was struck by debris that was thrown by a worker from the upper floor of the building. The Second Department held that defendants violated Industrial Code §23-1.7(a) as a matter of law given that there was no evidence overhead protection was in place on the date of the plaintiff's accident.

In the case at hand, Plaintiff was injured when he was struck by a temporary metal panel in an area that was normally exposed to falling material or objects. Plaintiff stated in his affidavit that, "Because the wall was being built, building material would normally fall from the wall, including discarded pieces of plywood, cements, sticks, and pieces of two-by-fours that were used to set the concrete in place." (Plaintiff's Exhibit 9, paragraph 13). Even though the area where Plaintiff was working was normally exposed to falling material, there was no overhead protection utilized by defendant to protect against the exposure of falling materials during construction.

Defendants argue the court should disregard Plaintiff's affidavit which asserts that debris consistently fell from the area where he was injured because this testimony was not specifically included with his deposition testimony. However, the court agrees with Plaintiff that the testimony was not specifically elicited by Defendants on this point at the deposition. Additionally, the cases cited by Defendants in support of their argument involve affidavits which contradict the deposition testimony which is not true of Plaintiff's affidavit in this case.

Having been working on this project for seven months, Plaintiff was well qualified to state in his affidavit that the area in which he was working at the time of the accident was normally exposed to falling material and objects and that no suitable overhead protection was provided at the time of the accident. Defendants, in contrast, submit no contradictory evidence. As such, they do not raise any material factual issues sufficient to defeat Plaintiff's showing of entitlement to judgment as a matter of law under Labor Law §241(6) based on TC-Park's violation of Industrial Code §23-1.7(a).

CONCLUSION

WHEREFORE it is hereby:

ORDERED that plaintiff's motion for summary judgment as to liability against T-C 425 Park Avenue, LLC is granted as set forth above and that the parties shall proceed to trial only on the issue of damages; and it is further

ORDERED that the motion for consolidation is granted and the above-captioned action is consolidated in this Court with Victor Gonzalez vs. T-C 425 Park Avenue, LLC, Index No. 156877/2021, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 158603/2018 and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____x

VICTOR GONZALEZ,

Plaintiff Index No 158603/2018

-against-

425 PARK OWNER, LLC, TISHMAN CONSTRUCTION CORPORATION, and T-C 425 PARK AVENUE LLC.

Defendants

_____x

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for Plaintiff shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

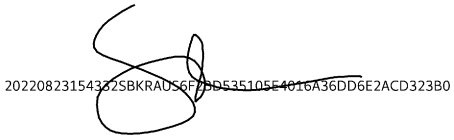
ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, Plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



8/23/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE