At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brookly, New York, 22nd on the day of September, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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ROBERTO CARLOS ALVES DOS SANTOS,

Plaintiffs,

Index No.: 505869/2019

-against-

DECISION AND ORDER

MS #3

EMPIRE MANAGEMENT & CONSTRUCTION LLC and PORTER AVE HOLDINGS LLC,

Defendants.

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The following papers numbered on this motion:

	NYSCEF Doc Numbers
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	37-38
Answering Affidavit (Affirmation)	52-54
Reply Affidavit (Affirmation)	55
Supplemental Affidavit (Affirmation)	
Pleadings –Exhibits	39-46
Stipulations – Minutes	
Filed Papers	

This action arises from a construction accident that occurred on March 11, 2018, at 1134 Fulton Street, Brooklyn, NY (the Premises).

Defendant PORTER AVE HOLDINGS LLC (Defendant PORTER) owned the Premises. Defendant EMPIRE MANAGEMNET & CONSTRUCTUION LLC (Defendant EMPIRE) was the general contractor for the construction project. Defendant EMPIRE contracted with non-party Magellan Structure Corp. (Magellan) to build a concrete

structure of the building located at the Premises. Plaintiff was employed as a carpenter for Magellan.

Plaintiff moves for partial summary judgment against Defendants as to liability on his claim pursuant to Labor Law § 240(1). Defendants oppose.

Plaintiff moves for summary judgment against Defendants on his claims pursuant to Labor Law § 240(1) arguing that his accident occurred because the safety device that Defendants had provided, a jack to support a 2 by 10 post, did not provide proper protection allowing the post to fall on Plaintiff.

Defendants in opposition offer an affidavit by Angela Levitan, a biomechanical engineer opining that Plaintiff's description of the accident is inconsistent with the laws of physics and the principals of biomechanics.

On the day of Plaintiff's accident, Plaintiff was instructed by his supervisor to shore a wooden form for a concrete wall that was going to be poured the next day. The shoring consisted of 2 by 10 lumber posts which were placed vertically against the form and were braced by a metal jack. The highest part of the jack was located near the top of the 2 by 10 post, and the lowest part of the jack was placed at an angle on the ground. Plaintiff was working on the first floor with his co-worker and one of them would hold the post and the other would install the jack. When his accident occurred, Plaintiff was regulating the jack when the vertical 2 by 10 post fell from the form striking Plaintiff on the left side of his head.

"'Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites'" (*Bascombe v. West 44th Street Hotel, LLC*, 124 AD3d 812, 813 [2d Dept 2015], quoting *Probst v. 11 W. 42 Realty Invs., LLC,* 106 AD3d

711, 711 [2d Dept 2013]). "To prevail on a cause of action pursuant to Labor Law § 240(1), the plaintiff must establish a violation of the statute and that the violation was a proximate cause of his injuries" (*id.)*.

Defendant PORTER, as owner of the premises, and Defendant EMPIRE, as general contractor of the project at the premises, are proper Labor Law § 240(1) Defendants.

"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" (*Wiski v. Verizon N.Y.*, 186 A.D.3d 1590, 1590 [2d Dept 2020], quoting *Romero v. 2200 N. Steel, LLC*, 148 AD3d 1066, 1067 [2d Dept 2017]). "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'" (*id.*, quoting *Fabrizi v. 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663 [2001]).

The 2 by 10 post that struck Plaintiff was an object that was required to be secured for Plaintiff for the purposes of the work being performed.

The jack that Plaintiff was regulating when he was struck by the post was a safety device to support the post, and that safety device was not properly placed or operated to give Plaintiff adequate protection.

Although Defendants have argued that there is a question of fact as to how Plaintiff's accident occurred, they have presented no evidence to support that contention. Plaintiff's version of the accident is undisputed and consistent with the account of Jose Geraldo, a co-worker who witnessed the accident.

The only evidence offered by Defendants is an affidavit from Angela Levitan, a biomechanical expert. Levitan's opinion is speculative and insufficient to raise a triable issue of fact (*see Wass v. County of Nassau*, 166 AD3d 1052 [2d Dept 2018]).

Levitan states that she reviewed the case file and numerous treatises and literature. However, she does not identify or list any of the treatises or literature she reviewed. Levitan relies on the undisputed testimony of how the accident occurred but concludes that Plaintiff's description of his accident defies the laws of physics and the principals of biomechanics. Levitan does not specify what laws of physics she relies on.

Levitan speculates how the accident *could* have happened. She speculates that the falling post would have come into contact with the jack which would have prevented it from falling in a perpendicular direction. However, this assumes that the jack did not fall along with the post, and Levitan does not state the basis for this assumption. Levitan then further asserts that such contact with the jack would have deflected the path of the falling post so that it would have moved laterally, in a direction generally parallel with the form wall. Levitan provides no specifics as to what angle the post would have hit the jack at, nor any specifics of the angle of the post's descent in relation to the form, other than being generally parallel.

Levitan then speculates that at such an angle the 10 foot tall post could not have hit Plaintiff. No evidence is provided as to the distance of the Plaintiff from the form to support the contention that the post could not have struck him.

"Mere speculative assertions unsupported by adequate foundational facts and accepted industry standards" in insufficient to defeat summary judgement (*DeLeon v. State*, 22 AD3d 786, 787-788 [2d Dept 2055]).

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

WHEREFORE, it is ORDERED that Plaintiff's motion for summary judgment is granted and Plaintiff is granted summary judgment against Defendants as to liability on his Labor Law § 240(1) claim.

This constitutes the decision and order of the Court.

ENTER,

J.S.C.