SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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EMILIO CUOMO,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, SKANSKA KOCH, INC.,KIEWIT INFRASTRUCTURE CO., SKANSKA KOCH/KIEWIT J.V.

Defendant.

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INDEX NO. 160629/2019

MOTION DATE 09/19/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71 were read on this motion to/for SUMMARY JUDGMENT.

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on January 29, 2019 at a construction site located at the Bayonne Bridge, Staten Island, New York.

The defendant The Port Authority Of New York & New Jersey (Port Authority) was the owner and the operator of the Bayonne Bridge. The defendants Skanska Koch, Inc., Kiewit Infrastructure Co. together as Skanska Koch/Kiewit J.V. (SKK) was the general contractor for the project. The project involved raising the roadway span of the bridge, among other work. Plaintiff worked for Welsbach Electric (Welsbach), an electrical sub-contractor that was contracted by the defendants SKK to perform the electrical installations on the project.

PENDING MOTION

On August 12th, 2022, plaintiff moved summary judgment on the issue of liability under Labor Law §§240(1) and 241(6). On September 19, 2022, the motion was fully briefed, marked submitted and the court reserved decision.

For the reasons stated below, the motion is granted as to the Labor Law §240(1) claim and denied as to the Labor Law §241(6) claim.

ALLEGED FACTS

Plaintiff, a union electrician, was working at a construction project located at the Bayonne Bridge, which connects Staten Island and New Jersey. The purpose of the project was to elevate the height of the bridge by constructing a new vehicular roadway above the original one—which was to be demolished—thereby allowing larger cargo ships to pass underneath the bridge.

The accident occurred on January 28, 2019, which was near the project's completion. Plaintiff was working on the Staten Island side of the bridge, along the exterior of the bridge's approach, which is the structural portion of the roadway that transitions from the street level to the bridge itself. On the morning of the alleged accident, plaintiff and his coworkers were installing conduit right outside the tunnel of the bridge. After three hours of working, he realized that they needed more materials. There was a storage area in the interior of the approach. Plaintiff testified that, to get to the approach's interior, he had to head south along the bridge's exterior until he came to a temporary boarding ladder that had four to five steps. The ladder led to a temporary wooden platform, which he estimated was about five feet high from the ground. Once on top of the platform, he had to crouch over for another four to six steps because the structure's ceiling was too low from that vantage point.

There was a three-step staircase at the edge of the platform. The interior of the Bayonne Bridge is a hollow space—similar to a tunnel—underneath the roadway where other construction trades were working. The staircase was resting within the interior of the bridge. Plaintiff had used this particular staircase approximately twenty times prior to his alleged accident and never had any concerns about it.

The accident occurred while plaintiff was descending the staircase. As he attempted to descend the staircase, instead of using both feet, he put his left hand on the top step and his left foot onto the middle step. It was during this maneuver that the staircase shifted. Plaintiff fell approximately two and a half feet from the wooden platform to the concrete floor and, as a result, allegedly injured his right shoulder.

Within a minute, Marc Quitsh (Quitsh), a coworker, arrived to check on him. Afterward, Plaintiff went to the Welsbach shanty that was onsite, where he reported the accident to Jerry Scotti (Scotti), Welsbach's safety person, and a police officer from the Port Authority. Scotti and the officer filled out accident reports.

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]).

Plaintiff's Failure to Plead Industrial Code 23-1.7(F) in The Complaint or Bill of Particulars Prior to Moving for Summary Judgment Requires Denial of the Motion

It is an elementary principle that a party cannot move for summary judgment on a cause of action that has never been alleged in litigation. CPLR §3212(b) states that summary judgment should be granted only when "the cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor" of the moving party. The statute's own terms allow a party to move for judgment on a "cause of action"; it does not, however, contemplate a party moving for summary judgment on a claim that was not alleged in the pleadings.

To state a claim under Labor Law § 241(6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications (*see Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d 494, 505, [1993]).

Plaintiff asserted Industrial Code 23-1.7(f) for the first time on summary judgment, that provision was not alleged in his complaint, or in his bill of particulars. Plaintiff served a

"supplemental" Bill including this provision for the first time after defendants filed their opposition papers.

Based on the foregoing, the supplemental Bill can not serve as the basis for the motion for summary judgment and the motion is denied.

Plaintiff is Entitled to Summary Judgment on his Labor Law §240(1) Claim

Where the effects of gravity cause an injury due to the failure of a ladder or other device enumerated in the statute to be properly constructed, operated or placed so as to provide proper protection, liability under Labor Law §240(1) will obtain. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (1991). The required safety devices listed in Labor Law §240(1), all of which are used in connection with height differentials, are intended to protect workers against either falling from a height or being struck by falling objects that were not secured. *Gordon v. Eastern Railway Supply, Inc.*, 82 N.Y.2d 555, 561 (1993); *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y. 2d 494, 501 (1993). The relevant inquiry is whether the harm flows directly from the application of the force of gravity to the object. *Runner v. New York Stock Exchange, Inc.*, 13 NY 3d 599, 604 (2009).

The unequivocal purpose of Labor Law §240(1) is to ensure the maximum protection of workers by placing the ultimate responsibility for work site safety on the owner, the general contractor and their agents, instead of on the workers themselves. 1969 N.Y. Legis. Ann. at 407; *Zimmer v. Chemung County Perf. Arts, Inc.*, 65 N.Y. 2d 513 at 520-521 (1985); *Guillory v. Nautilus Real Estate*, 208 A.D. 2d 336 at 338 (1st Dept.). Liability is absolute and contributory negligence of the injured worker is no defense. *Rocovich v. Consolidated Edison Co.*, *supra* at 513. *Zimmer v. Chemung County Perf. Arts, Inc.*, *supra* at 521. Absolute liability is imposed under Labor Law §240(1), as a matter of law, once it is shown that a worker was injured due to a

gravity-related hazard for which proper protection was not provided. *Rocovich v. Consolidated Edison Co.*, *supra* at 515.

It is well settled that the failure of a ladder or scaffold to remain stable and erect constitutes a violation of Labor Law §240(1) as a matter of law. *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 NY 3d 280, 289 [Fn. 8] (2003); *Montalvo v. J. Petrocelli Constr., Inc.*, 8 A.D. 3d 173, 174 (1st Dept. 2004). When an unsecured ladder shifts, moves or slips out from under a worker, and causes him to fall, a prima facie violation of Labor Law §240 (1) is established. *Tuzzolino v. Consolidated Edison Company of New York*, 160 A.D. 3d 568 (1st Dept. 2018); *Merrino v. Continental Towers Condominium*, 159 A.D. 3d 471, 472-473 (1st Dept. 2018); *Keve v. Greenpoint-Goldman Corp.*, 150 A.D. 3d 453, 454 (1st Dept. 2017).

A temporary staircase that is used on a jobsite to facilitate a plaintiff's access to a different elevation level is an elevation device within the meaning of Labor Law §240(1). *See, Megna v. Tishman Construction Corporation of Manhattan*, et al, 306 A.D.2d 163 (1st Dept., 2003); *Wescott v. Shear, Jr., et al*, 161 A.D.2d 925 (3rd Dept., 1991). A makeshift staircase that is used as access to different levels of a worksite serves as the functional equivalent of a ladder under Labor Law §240(1). *See McGarry v. CVP 1 LLC, 55 AD.3d 441* (1st Dept., 2008).

Defendants allege in opposition that plaintiff had misused the temporary staircase from which he fell, that the three-step temporary staircase was not defective and that the accident reports, and testimony of Scotti raise triable issues of fact.

However, plaintiffs are not required to show that a safety device is defective or failed to comply with applicable safety regulations. *See, Williams v. 520 Madison Partnership*, 38 A.D.3d 464, 465 (1st Dept., 2007); *Montalvo v. J. Petrocelli Constr. Inc.*, 8 A.D.3d 173, 174 (18t Dept, 2004). It is sufficient that the device proved inadequate to shield plaintiff from harm directly

flowing from the application of the force of gravity. *Williams v. 520 Madison Partnership, supra* at 465.

There is no dispute in this action that the temporary staircase that the plaintiff was using to descend from on top of the elevated wooden scaffold within the Bayonne Bridge failed to remain stable, secure, and shifted causing the plaintiff to fall to the ground. Not only was this plaintiff's testimony, but his testimony was corroborated by his foreman Joseph Modzelewski (Modzelewski) and his co-worker Quitsh. Modzelewski states that the three-step staircase was placed up against the wall alongside the platform, but it was not secured and would move when the workers used it. In addition, Modzelewski stated that Scotti, had asked the general contractor to remove the temporary staircase because he did not feel that it was stable and safe. He states that the staircase was never removed until after the plaintiff's accident.

Defendants' argument that Scotti's testimony creates an issue of fact is rejected. The fact that Scotti looked at the temporary staircase after, or that it was used without a problem before, does not raise an issue of fact as to what happened at the time of the accident.

The affidavit of Quitsh states that he was in the area where the plaintiff's accident occurred and observed the plaintiff stepping down onto the three step temporary staircase when it moved and shifted causing plaintiff to fall. He confirms that the stairs were not secured in any fashion and in order to utilize the stairs a worker would have to step on it sideways which made the temporary staircase unstable. Quitsh approximated his distance from where the plaintiff fell as being about 50 feet away and based upon this the defendants question his credibility as to whether he actually witnessed the plaintiff's accident. However, defendants on their accident report prepared by the Skanska Safety Manager, Scott Kohler, acknowledge Quitsh is a witness.

The defendants allege that factual issues are presented because the accident report fails to mention that the staircase shifted. The case of *Hill v. City of New York*, 140 A.D.3d 568 (1" Dept. 2016) is on point and stands for the proposition that the fact that an accident report prepared by the plaintiff's employer fails to state that the ladder wobbled prior to the plaintiff's fall does not contradict the plaintiff's statement that the ladder wobbled and was not a basis for the court to deny plaintiff summary judgment pursuant to Labor Law §240(1).

Finally, any claims that plaintiff was contributorily negligent are insufficient to deny summary judgment on this record. As held by the Court of Appeals:

> Throughout our section 240(1) jurisprudence we have stressed two points in applying the doctrine of strict (or absolute) liability. First, that liability is contingent on a statutory violation and proximate cause. As we said in *Duda,* 32 N.Y.2d at 410, 345 N.Y.S.2d 524, 298 N.E.2d 667, "[v]iolation of the statute alone is not enough; plaintiff [is] obligated to show that the violation was a contributing cause of his fall," and second, that when those elements are established, contributory negligence cannot defeat the plaintiff's claim. Section 240(1) is, therefore, an exception to CPLR 1411, which recognizes contributory negligence as a defense in personal injury actions (*see Mullen v. Zoebe, Inc.,* 86 N.Y.2d 135, 143, 630 N.Y.S.2d 269, 654 N.E.2d 90 [1995]; *Bland v. Manocherian,* 66 N.Y.2d 452, 461, 497 N.Y.S.2d 880, 488 N.E.2d 810 [1985]).

Blake v. Neighborhood Hous. Servs. of New York City, Inc., 1 N.Y.3d 280, 287 (2003).

Based on the foregoing the court finds that plaintiff has made out a *prima facie* cause of action for liability under Labor Law §240(1) and defendants have failed to rebut same by showing a question of material fact which requires trial on this issue.

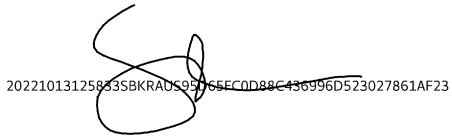
WHEREFORE it is hereby:

ORDERED that plaintiff's motion for partial summary judgment as to liability under Labor Law §240(1) is granted and the balance of the motion is denied: and it is further

ORDERED that, within 20 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); and it is further

ORDERED that such service upon the Clerk 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 this constitutes the decision and order of this court.



10/13/2022
DATE

SABRINA KRAUS, 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