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| Giresi v RCB1 Nominee LLC |
| 2022 NY Slip Op 33718(U) |
| October 24, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 158921/2019 |
| Judge: David B. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 158921/2019

JOSEPH GIRESI,

Plaintiff,

MOTION SEQ. NO. 002

- v -

RCB1 NOMINEE LLC, TISHMAN CONSTRUCTION CORPORATION, THE GENERAL INVESTMENT & DEVELOPMENT COMPANIES, RCB1 RESIDENTIAL FOR SALE LLC, RCBI RENTAL LLC, and GID DEVELOPMENT GROUP,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action, plaintiff Joseph Giresi moves, pursuant to CPLR 3212, for summary judgment as to liability on his common-law negligence claim, as well as on his claims pursuant to Labor Law sections 200, 240(1), and 241(6) against defendants RCB1 Nominee LLC, Tishman Construction Corporation, The General Investment & Development Companies, RCB1 Residential for Sale LLC, RCBI Rental LLC, and GID Development Group (collectively "defendants"). Defendants oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on March 1, 2019, in which plaintiff, a carpenter employed by nonparty New York City Acoustics ("NYCA"), was injured while working at 400 West 61st Street in Manhattan ("the site" or "the premises"), where four residential towers were

being built. The premises were owned by defendants RCB1 Nominee LLC, RCB1 Residential for Sale LLC, and RCBI Rental LLC. Defendant GID Development Group was an agent of the owners and Tishman Construction Company (“Tishman”) was the construction manager at the site.

On the date of the alleged incident, plaintiff was told by his foreman to sheetrock the ceiling of a room in the basement of one of the towers. Since the ceiling was 12 feet high, a scaffold was required to reach it. No such scaffold was available and so plaintiff’s foreman told him to borrow parts of a scaffold from another contractor at the site. Plaintiff and a co-worker built a baker’s scaffold in order to perform the work. After working on the 6-foot-high scaffold for approximately 20 minutes, it collapsed and plaintiff fell to the ground sustaining injury. Plaintiff believed that the collapse occurred because the springs securing the arm of the scaffold failed. Rafael Trejo of Tishman testified that a scaffold could collapse if it was improperly assembled or improperly maintained.

On or about September 13, 2019, plaintiff commenced the captioned action by filing a summons and complaint. On August 16, 2021, plaintiff filed an amended complaint in which he alleged that defendants were negligent and violated Labor Law sections 200, 240(1), and 241(6). Defendants filed an answer to the amended complaint on or about October 28, 2021.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendants on the issue of liability, contending that they were negligent and violated Labor Law sections 200, 240(1), and 241(6). In support of the motion, plaintiff argues, inter alia, that he is entitled to summary judgment on his Labor Law section 240(1) claim against defendants because he was provided with a defective scaffold. He further asserts that the collapse of the scaffold constitutes

prima facie evidence of a violation of the statute and that defendants have failed to raise an issue of material fact warranting denial of the motion.

In opposition, defendants argue, inter alia, that the branch of plaintiff's motion seeking liability pursuant Labor Law section 240(1) must be denied because a material question of fact exists regarding whether the scaffold was defective and/or whether it was improperly constructed by plaintiff. They further assert that plaintiff's claim that the scaffold was defective is speculative.

In reply, plaintiff reiterates his contention that he is entitled to summary judgment pursuant to Labor Law section 240(1) since the scaffold collapsed. He further asserts that, even if he had been negligent in assembling the scaffold, his comparative negligence is not a defense to a claim pursuant to section 240(1).

LEGAL CONCLUSIONS

It is well settled that a party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*See CPLR 3212*). In deciding the motion, a court must view the facts in the light most favorable to the non-moving party (*See Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). Once the movant meets his or her burden, the burden shifts to the non-moving party to establish the existence of a material issue of fact (*See Vega v Restani Constr. Corp.*, *supra*).

Labor Law section 240(1) provides that:

[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . 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 [construction workers employed on the premises].

The duty imposed by Labor Law section 240(1) is nondelegable, and an owner or contractor which breaches that duty may be held liable for damages "regardless of whether it has actually exercised supervision or control over the work." (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). Additionally, "where an accident is caused by violation of the statute, the plaintiff's own negligence does not furnish a defense" (*Cahill v Triborough Bridge and Tunnel Authority*, 4 NY3d 35, 39 [2004]). However, there can be no liability under Labor Law section 240(1) where there is no violation and the worker's actions are the sole proximate cause of the accident (*Id.*; see *Barreto v Metropolitan Transp. Authority*, 25 NY3d 426 [2015]).

To prevail on his motion for summary judgment pursuant to Labor Law section 240(1), plaintiff must establish that the statute was violated because the scaffold lacked appropriate safety devices and that such violation proximately caused his accident (*See Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 (2003)). Here, plaintiff testified that, at the time of the incident, he was standing on a baker's scaffold taking measurements as he installed sheetrock. As he stood on the scaffold, it collapsed and he fell to the ground. Plaintiff testified that one of the springs securing an arm of the scaffold failed, causing the arm to release and resulting in his fall to the ground.

In cases such as this, "involving ladders or scaffolds that collapse or malfunction for no apparent reason", the Court of Appeals has applied "a presumption that the ladder or scaffolding device was not good enough to afford proper protection" (*Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 454 [1st Dept 2017] quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1

NY3d at 289 n 8). As noted previously, Trejo testified that a scaffold could collapse if it was improperly assembled or improperly maintained and neither he nor any other witness has contradicted plaintiff's claim regarding the cause of the collapse.

To the extent defendants suggest that plaintiff was negligent in failing to properly assemble the scaffold before he used it, it is well settled that plaintiff's comparative negligence is not a defense to liability under Labor Law section 240 (1) (*see Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]) since defendants' failure to ensure that the scaffold provided "proper protection, and was properly secured and braced, constituted a proximate cause of the accident" (*See Collins v West 13th St. Owners Corp.*, 63 AD3d 621, 622 [1st Dept 2009] [rejecting "defendants' argument that the onus is on plaintiff to construct an adequate safety device"]).

Nor does defendants' sole proximate cause argument have any merit. "To raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Quinones v Olmstead Props., Inc.*, 133 AD3d 87, 89 [1st Dept 2015], quoting *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]). Here, defendants have adduced no evidence establishing, or even suggesting, that a sole proximate cause defense exists.

It is not necessary for this Court to address plaintiff's common-law negligence claim or his claims pursuant to Labor Law sections 200 or 241 (6) since the granting of summary judgment as to liability on his section 240 (1) claim renders defendants absolutely liable and, thus, renders alternative theories of liability academic (*See Pimentel v DE Freight LLC*, 205 AD3d 591, 593 [1st Dept 2022], citing *Hewitt v NY 70th St. LLC*, 187 AD3d 574, 575 [1st Dept

2020]; see also *Golubowski v City of NY*, 131 AD3d 900, 901 [1st Dept 2015], citing *Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 12 [1st Dept 2011]).

The parties' remaining contentions are either without merit or need not be addressed in light of the findings above. Accordingly, it is hereby:

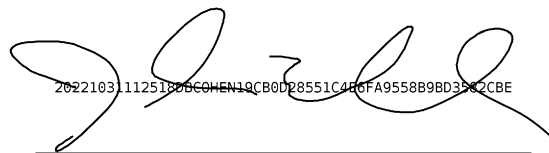
ORDERED that the branch of the motion by plaintiff Joseph Giresi seeking summary judgment as to liability, pursuant to CPLR 3212, on his Labor Law section 240(1) claim against defendants against defendants RCB1 Nominee LLC, Tishman Construction Corporation, The General Investment & Development Companies, RCB1 Residential for Sale LLC, RCB1 Rental LLC, and GID Development Group is granted, and the motion is otherwise denied as academic; 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 Court (60 Centre Street, Room 141B), who is directed to enter judgment accordingly; 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 matter shall proceed to trial on the issue of the amount of damages to be awarded to plaintiff.

10/24/2022
DATE



DAVID B. COHEN, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |