To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

PRESENT: HON. CHRISTIE L. D'ALESSIO, J.S.C.

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MICHAEL TRUELOVE,

Plaintiff(s),

-against-

CRICKET VALLEY ENERGY CENTER, ADVANCED POWER SERVICES (NA) INC., and BECHTEL INFRASTRUCTURE AND POWER CORPORATION,

Defendant(s).

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DECISION AND ORDER
Index No. 2019-53037
Motion Seq. No. 2, 3

The following papers were filed to New York State Courts Electronic Filing ("NYSCEF") and read on Plaintiff's motion for partial summary judgment (Motion No. 2), and Defendants' motion for summary judgment and dismissal of Plaintiff's complaint in its entirety (Motion No. 3).[1]

NYSCEF Doc. No. 47-66, 73, 80-107

Background Facts:

Plaintiff commenced this action to recover for personal injuries allegedly sustained during the course of employment on a construction site while utilizing a scaffold. The following facts are asserted by the Plaintiff. On October 12, 2018, Plaintiff Michael Truelove was working as a carpenter apprentice engaged in the construction of a scaffold stair tower on the premises of the Defendant Cricket Valley Energy Center ("CVEC"), a powerplant located at 2241 Route 22, Dover Plains, New York (Dutchess County). Plaintiff was manually hoisting a Klein bag rated at 100 pounds and a 9-foot vertical scaffolding leg which was to serve as a vertical post for the scaffolding above. Plaintiff was directed by his supervisor to hoist the aforesaid materials from the ground level up to the fifth-floor platform where he was working. Plaintiff was to hoist those materials up to his fifth-floor level with a rope hand over hand, while standing on the fifth floor of the scaffolding tower. While raising up those materials to the fifth floor with a single rope hand over hand, Plaintiff suffered an injury to his lower back. Plaintiff alleged that he suffered severe injuries to his lower back requiring surgery and will likely never work again as a result of this incident.

[1] It is noted that Plaintiff executed a stipulation discontinuing his claims against Advanced Power Services (NA) Inc. without prejudice. (See, NYSCEF Doc. No. 15).

Plaintiff's Motion [Motion Sequence No. 2]:

Plaintiff filed a motion for partial summary judgment pursuant to CPLR § 3212 and Labor Law § 240(1), together with such other and further relief as to this Court may seem just and proper. Counsel avers that Labor Law § 240(1) imposes absolute liability on owners and general contractors at construction sites, where, as here, an elevation related hazard is a proximate cause of an injury. Counsel argues that neither the general contractor (Bechtel) nor the owner (CVEC) provided Plaintiff with any type of gin wheel, pulley, or other mechanical hoist in order to allow him to safely hoist heavy materials upwards of 50 feet and prevent him from being injured.

Defendant's Motion [Motion Sequence No. 3]:

Defendants filed a [cross] motion for summary judgment and dismissal of Plaintiff's complaint in its entirety. First, counsel contends that Plaintiff's motion must be denied for failure to file a Statement of Material Facts as proscribed by 22 NYCRR §202.8(g).

Second, counsel contends that Defendants are entitled to summary judgment on Plaintiff's common-law negligence and Labor Law §200 causes of action. In that regard, counsel contends that CVEC did not exercise supervision and control over the means and methods of the work onsite. Counsel further contends that neither CVEC nor Bechtel possessed actual or constructive notice of an unsafe condition on the subject worksite. Counsel also argued that Bechtel did not fail to provide a reasonably safe worksite.

Third, Defendants are entitled to summary judgment on Plaintiff's Labor Law §240(1) claim. In that regard, counsel contends that Plaintiff's alleged injuries were not caused by the limited type of elevation-related hazards contemplated by the statute. Counsel argues that Plaintiff did not fall from a height, nor did his injury result from a falling object. Rather, Plaintiff claims due to Defendants' failure to provide a gin wheel, pulley or other safety device, he suffered an injury to his back due to the strain of using a rope to lift a roughly 30-pound scaffold pole up from the ground to the fifth-floor landing of the scaffold tower on which he was standing.

Fourth, Defendants are entitled to summary judgment on Plaintiff's Labor Law §241(6) claim. Counsel contends that, as pleaded, the alleged violations of Sections 23-1.7, 23-2, 23-4, 23-6.1, and 23-9 fall far short of providing any specificity. To the contrary, by not pleading any subdivisions at all, Plaintiff has implicitly pleaded every single subdivision of each of the above Industrial Codes. Counsel contends that it would therefore be impermissibly prejudicial and unduly burdensome for defendants to speculate as to which subdivisions plaintiff actually intends to prove were violated. Accordingly, these alleged Industrial Code violations should be summarily dismissed.

Decision:

As a preliminary matter, Defendant's contention that Plaintiff's motion should be denied outright for failure to file a Statement of Material Facts pursuant to 22 NYCRR §202.8(g) is denied. Considering that Defendants were able to provide their own counter statement of material facts and address the merits of Plaintiff's motion, this Court fails to see how Defendant was prejudiced by Plaintiff's failures and, therefore, excuses such nonprejudicial defects under CPLR 2001 and CPLR 2101 (*see Carino v Mertens*, 2022 NY Slip Op 50525[U] [Sup Ct, Dutchess County 2022], *citing Disarli v TEFAF NY, LLC*, 2022 NY Slip Op 30029 [U] [Sup Ct, Kings County 2022]).

As to the merits of the parties' dispositive motions, Plaintiff's motion for partial summary judgment pursuant to CPLR § 3212 and Labor Law § 240(1) on the issue of liability is granted, and Defendants' cross-motion for summary judgment and dismissal of Plaintiff's complaint is denied for the foregoing reasons.

Labor Law § 240(1) imposes absolute liability on owners and general contractors at construction sites, where, as here, an elevation related hazard is a proximate cause of an injury. Labor Law 240(1), in pertinent part, states:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." (Labor Law 240(1) (emphasis added).

To establish a prima facia case pursuant to Labor Law § 240(1), a Plaintiff must demonstrate that the risk of injury from an elevated related hazard was foreseeable and that the absent or defective protective device enumerated in the statute was a proximate cause of the injuries". (*Shipkoski v. Watch Case Factory Associates,* 292 A.D.2d 587, 588 [2nd Dept. 2002]; *See also, Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667, 699-70 [2nd Dept. 2007]). To succeed on a cause of action pursuant to Labor Law § 240(1), Plaintiff must establish that a... contractor failed to provide appropriate safety devices at an elevated worksite and that such violation of the statute was the proximate cause of his injuries. (*Ramsey v. L DeMattes Constr. Corp.*, 79 A.D.3d 720, 722 [2nd Dept. 2010]). Labor Law § 240(1) is violated where a general contractor or owner fails to provide a worker with adequate protection against the risk from a physically significant elevation differential. (*Runner v. New York Stock Exchange Inc.*, 13 N.Y.3d 599, 603 [2009]).

"Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, a ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person." (*Ross v. Curtis Palmer*, 81 N.Y.2d 494, 501 [1993]). "The single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. (*Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d at 603 [2009]).

The motion record raises issues of fact warranting denial of the parties' dispositive motions. Plaintiff alleges that he was not provided with any mechanical hoist, gin wheel, or pulley or other device so constructed, placed and operated to give proper protection to Plaintiff at the time of his accident. Plaintiff claims that his scaffolding foreman, Thomas Soricelli, directed him to manually hoist with a rope, a nine-foot nine-inch galvanized steel scaffolding pole weighting 30lbs or more and a 100lb rated Klein bag up from the ground floor to the fifth-floor scaffolding tower that he was erecting at the time of the accident. Plaintiff alleged that no mechanical gin wheel or other mechanical device was provided to him to assist him in elevating the materials to the fifth floor which was a distance of upwards of 50 feet. (Szarka Aff. Exhibit "H", Soricelli EBT pg. 43:14- 17). It is alleged

that Plaintiff sustained injury to his lower back while trying to lift the materials over the top railing, and fighting gusty winds,. (Szarka Aff. Exhibit "J" - Bechtel Injury Information worksheet of Nurse Carol Herbert). In contract, Defendants alleged that Plaintiff was provided with gin wheels which were made available at the worksite at the time of the incident. Defendant cites the deposition testimony of Mr. Villalobos who testified that gin wheels were available at the worksite as of October 12, 2018, and there was no shortage of them. (Villalobos EBT p. 41:4-6). There also were no instances he was aware of where gin wheels were out of inspection. (*See id.* at pp. 38:15 - 39:11). Defendants note that Mr. Villalobos' testimony was corroborated by the testimony of Jeramie Arellano, a Bechtel employee and on-site safety representative (*see* Arellano EBT at pp. 14:4-17, 15:7-17, 18:22-19:2, 20:4-10, 87:10-11) and Kenneth Evans, a Bechtel project environmental safety and health supervisor (*see* Evans EBT at pp. 48:15-49:11, 53:17-54:9). Accordingly, the motion record raises issues of fact, including whether gin wheels were provided at the worksite and whether any failure to provide same was the proximate cause of Plaintiff's injuries.

All other arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Based on the foregoing, it is hereby

ORDERED that, with respect to Motion Sequence No. 2, Plaintiff's motion for partial summary judgment pursuant to CPLR § 3212 and Labor Law § 240(1) on the issue of liability is denied. It is further

ORDERED that, with respect to Motion Sequence No. 3, Defendants' motion for summary judgment and dismissal of Plaintiff's complaint is denied. It is further

ORDERED that a **settlement conference is scheduled for January 26, 2023 at 11:00a.m. Personal appearances are required in Courtroom 106**. In the event this matter does not settle at the next conference, counsel shall request a pre-trial settlement conference and trial date. It is further

ORDERED that the movant is directed to serve a copy of this decision with notice of entry within ten (10) days hereof.

The foregoing constitutes the Decision and Order of this Court.

Dated: December 7th, 2022
Poughkeepsie, New York

HON. CHRISTIE L. D'ALESSIO, J.S.C.

TO: All parties/counsel of record by NYSCEF

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.