SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART 18**

Justice

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HILARIO POMAQUIZA, ANA POMAQUIZA,

Plaintiffs,

- v -

616 FIRST AVENUE, LLC, JDS CONSTRUCTION GROUP, LLC,

Defendants.

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INDEX NO. 156009/2017

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, plaintiff moves for summary judgment on his Labor Law § 240 (1) claim and defendants cross move for summary judgment on all of plaintiff's claims. Those branches of the cross-motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6), Labor Law § 200 and common law negligence claims were granted without opposition as set forth on the record on April 19, 2023.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). "In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American

Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

"Section 240 (1) of the Labor Law, often referred to as the 'scaffold law,' provides that '[a]ll contractors and owners and their agents' engaged in cleaning a building or structure shall furnish or erect proper scaffolding, ladders and similar safety devices to protect employees in the performance of the work" (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]). The law "was designed to prevent those types of accidents in which the scaffold, hoist, stay, 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 Hydro-Elec. Co., 81 NY2d 494, 501 [1993] [emphasis removed]). "[Courts] have adhered to the bedrock principle that the statute is to be construed liberally to achieve its purpose of protecting workers" (O'Brien v Port Auth. of N.Y. & N.J., 29 NY3d 27, 35-36 [2017] [Rivera, J., dissenting]). However, "[n]ot every worker who falls at a construction site, and not any object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1)" (Blake v Neighborhood Hous. Services of New York City, Inc., 1 NY3d 280, 288 [2003], quoting Naducci v Manhasset Bay Assoc., 96 NY2d 259, 267 [2001] [internal quotations omitted]).

"The kind of accident triggering section 240 (1) coverage is one that will sustain the allegation that an adequate 'scaffold, hoist, stay, ladder or other protective device' would have 'shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (Salazar v Novalex Contr. Corp., 18 NY3d 134, 139 [2011], quoting Runner v New York Stock Exch., Inc., 13 NY3d 599, 604 [2009], quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 501). The statute applies to both falling worker and falling

object cases (Narducci v Manhasset Bay Associates, 96 NY2d 259, 267 [2001]). In falling object cases, the statute "applies where the falling of an object is related to a significant risk inherent in . . . the relative elevation . . . at which materials or loads must be positioned and secured" (id. at 267-68, quoting Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]). It "does not apply in situations in which a hoisting or securing device of the type enumerated in the statute would not be necessary or expected" (Ruiz v Ford, 160 AD3d 1001, 1003 [2d Dept 2018] [quotation marks and citations omitted]). Section 240 (1) generally covers injuries sustained if a worker transports a heavy object up or down stairs without proper safety equipment. See Runner v New York Stock Exch., Inc. 13 NY3d 599 [2009]; see Conlon v Carnegie Hall Socy., Inc. 159 AD3d 655 [1st Dept 2018]

In order to meet his prima facie burden, plaintiff must demonstrate both a violation of the statute and causation (see Blake, 1 NY3d at 289). Here, it is undisputed that plaintiff and his two co-workers were tasked with moving a 200-pound concrete leveler down a set of stairs, which would have normally been moved between floors via an elevator. Plaintiff was already on the third step below, holding the rear end of the leveler at the handles, while the co-workers were holding the drum of the leveler on the landing. The co-workers lifted it, were not able to hold it, dropped it, causing the handle to strike plaintiff's right arm resulting in the injury. The force of a 200-pound object being dropped and then striking plaintiff, who was at a level lower than the rest of the machine, sufficiently triggers the protection of § 240 (1) (see Dirschneider v Rolex Realty Co. LLC, 157 AD3d 538, 539-40 [1st Dept 2018] ["The record establishes a failure to provide plaintiff and his coworker with devices offering adequate protection against the gravity-related risks of moving an extremely heavy object down a staircase, leading to the workers' loss of control over the object's descent and plaintiff's injuries"]). Contrary to defendants'

contentions, the fact that plaintiff was not already in the process of moving down the stairs past the third step, nor the reason why the co-workers dropped the leveler, does not make plaintiff's prima facie showing insufficient or otherwise demonstrate an issue of fact sufficient to require denial of the motion (see Agli v 21 E. 90 Apartments Corp., 195 AD3d 458 [1st Dept 2021]).

The Court has considered all remaining contentions and finds them unavailing.

Accordingly, it is hereby ORDERED that the branches of the defendants' cross motion for summary judgment dismissing plaintiff's Labor Law § 241 (6), § 200 and common law negligence claims is granted; and it is further

ORDERED that the remainder of the cross-motion as to § 240 (1) is denied; and it is further

ORDERED that plaintiff's motion for summary judgment on the Labor Law § 240 (1) claim is granted on the issue of liability and the matter shall proceed to a trial on damages.

This constitutes the decision and order of the Court.

5/4/2023
DATE

ALEXANDER M. TISCH, 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