| **Greaves v Northeastern Conference Corp. of Seventh-Day Adventists** |
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| 2023 NY Slip Op 33144(U) |
| August 31, 2023 |
| Supreme Court, Kings County |
| Docket Number: Index No. 518040/2020 |
| Judge: Devin P. Cohen |
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**Supreme Court of the State of New York**
**County of Kings**

**Index Number 518040/2020**
Seqs. 003

Part LL1

**DECISION/ORDER**

MELVIN GREAVES,

Plaintiff,

against

NORTHEASTERN CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

| Papers Numbered | |
|---|---|
| Notice of Motion and Affidavits Annexed | 1 |
| Order to Show Cause and Affidavits Annexed. | |
| Answering Affidavits | 2 |
| Replying Affidavits | 3 |
| Exhibits | Var. |
| Other | |

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 003) is decided as follows:

**Introduction & Factual Background**

This action arises out of injuries plaintiff claims to have sustained on August 10, 2020 at South Brooklyn Seventh Day Adventist Church (the church). The following is undisputed: Lall Bisram, the first elder of the church, hired plaintiff to perform plaster work at the premises. The premises is owned by the defendant. Plaintiff accessed the premises by contacting the building custodian, Vincent Smith. The scaffold upon which the plaintiff was working was owned by the church. It is also undisputed that the accident was unwitnessed (Greaves EBT at 36; *see* Aff. in Opp. at ¶ 19).

However, the parties allege two different versions of how the accident happened. Plaintiff testified that while he was walking front-to-back along the planks on the baker's scaffold, the plank he was on "tilted" and he fell to the ground (Greaves EBT at 65–66). The

plaintiff testified that the scaffold was already constructed when he arrived to work at the site (*id.* at 46).

Defendant, by contrast, argues based on the affidavit of Mr. Smith that the plaintiff constructed the scaffold when he arrived, and that Mr. Smith helped him assemble the scaffold (Smith Aff. at ¶ 5; *see* Aff. in Opp. at ¶ 12). Mr. Smith's affidavit further states that the plaintiff walked off the end of the board and that the board did not tilt (Smith Aff. at ¶ 8). However, it is uncontested that the accident was unwitnessed and Mr. Smith does not identify the source of his information. Mr. Smith's theory about how the plaintiff fell is, therefore, mere speculation.

The plaintiff also testified that he asked for a safety harness and that Mr. Smith said that there were none at the site, and plaintiff was concerned at the lack of a safety harness (Greaves EBT at 63, 64); defendant does not address this contention in its opposition.

**Analysis**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

**Labor Law § 240 (1)**

Labor Law § 240 (1) imposes a non-delegable duty on owners and general contractors to provide safety devices necessary to protect workers from gravity-related risks, including falling from an elevated work surface (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). Liability attaches where a plaintiff proves that the defendant violated the statute and that the violation was a proximate cause of the accident (*Escobar v Safi*, 150 AD3d 1081, 1082 83 [2d

Dept 2017]). A plaintiff can obtain summary judgment even when he is the sole witness to the accident if his testimony resolves all questions of fact and is unrebutted by other admissible evidence (*see Cardenas v 111-127 Cabrini Apartments Corp.*, 145 AD3d 955, 957 [2d Dept 2016]).

Plaintiff testified both that the scaffold upon which he was working lacked cross-bars or other safety railings to prevent him from falling and that he requested a harness but was not provided with one. An owner is statutorily required to ensure an individual performing qualified work has proper safety devices, including a scaffold, and the owner can be liable even if it did not exercise supervision or control the work (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003]). Plaintiff's deposition testimony that the plank on which he was walking "tilted" underneath him and caused him to fall (Greaves EBT at 65), and that he was not provided with adequate safety devices to prevent his fall, is sufficient to make out a prima facie case for summary judgment.

Defendant argues that absence of safety railings and any unsecured planks flowed from the way that the plaintiff constructed the scaffold and, therefore, that he was sole proximate cause of his accident. However, defendant acknowledges that Mr. Smith assisted plaintiff in assembling the scaffold. Plaintiff cannot, therefore, have been the sole proximate cause of his accident (*see e.g. Orellana v 7 West 34th Street, LLC*, 173 AD3d 886 [2d Dept 2019]).

Defendant also alleges that plaintiff walked off the end of the scaffold. However, it is undisputed that the accident was unwitnessed (Aff. in Opp. at ¶ 19), and therefore Mr. Smith's allegation about how the accident occurred is speculation insufficient to resist a motion for summary judgement (*Pesantes v Komatsu Forklift USA, Inc.*, 58 AD3d 823 [2d Dept 2009]).

Finally, plaintiff's contention that he requested a harness and was not provided with one would constitute a further statutory violation (*see Gallagher v New York Post*, 923 NE2d 1120 [2010]). This testimony is unrefuted.

Plaintiff's motion is therefore granted as to Labor Law § 240 (1).

**Labor Law § 241 (6)**

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). In the instant action, plaintiff alleges violations of I.C. §§ 23-1.5 (c) (3), 5.1, 5.3, and 5.4.

The general inspection requirement of I.C. § 23-1.5 is overridden by the specific scaffold provisions in the Industrial Code (specifically Rule 5.1 *et seq.*) (*Zaino v Rogers*, 153 AD3d 763, 764 [2d Dept 2017]). Numerous provisions of 5.1 do not apply, including 5.1 (a), (b), (c), (d), (g), (h), (i), and (k). Additionally, Rule 23-5.1 (f) is not specific enough to support a Labor Law § 241 (6) claim (*Pontes v F&S Contr., LLC*, 146 AD3d 829, 830 [2d Dept 2017]).

Rule 5.1 (j), which is both sufficiently specific and relevant to the facts of this case, contains an exemption from the safety-railing requirement for scaffolds less than eight feet. Here, plaintiff testified that he fell eight feet while Mr. Smith's affidavit states that the scaffold was five to seven feet tall. Considering these competing statements about the height of the scaffold, whether or not the height exemption contained in I.C. 23-5.1 (j) applies is a question of fact.

Finally, Rule 5.1 (e), which is sufficiently specific and applies to the facts of this case, reads as follows:

> (e) [S]caffold planks shall extend not less than six inches beyond any support nor more than 18 inches beyond any end support. Such six inch minimum requirement shall not apply when such planks are securely fastened in place. Scaffold planks shall be laid tight and inclined planking shall be securely fastened in place.

Plaintiff's testimony that the plank he was standing on "tilted" and that he fell to the ground because the plank tilted is sufficient to meet a prima facie burden as to his Labor Law § 241 (6) claim predicated on a violation of Rule 23-5.1 (e).

Defendant also argues that plaintiff directed the construction of the scaffold and is therefore, minimally, comparatively negligent for any violation of the Industrial Code. "Contributory and comparative negligence are valid defenses to a section 241 (6) claim" (*Riffo-Velozo v Vil. of Scarsdale*, 68 AD3d 839, 842 [2d Dept 2009]). Plaintiff testified that the scaffold was constructed when he arrived, implying that the decision about how to lay the planks and whether or not to set up the safety railings was not his own. Mr. Smith's affidavit states that the plaintiff assembled the scaffold, and that Mr. Smith was an assistant (Smith Aff. at ¶ 2). In light of the limited question of fact about the extent of plaintiff's involvement in constructing the scaffold, and by extension whether he was comparatively negligent for any violations of the Industrial Code, summary judgment on Labor Law § 241 (6) is denied (*see e.g. Amirr v Calcagno Const. Co.*, 257 AD2d 585 [2d Dept 1999; *see also Harinarian v Walker*, 73 AD3d 701 [2d Dept 2010]).

As plaintiff's allegations involving violations of Rules 23-5.3 and 5.4 are similarly about the construction of safety railings on scaffolds, summary judgment is also precluded by the question of fact about plaintiff's comparative negligence solely in this context.

**Conclusion**

Plaintiff's motion for summary judgment (Seq. 003) is granted as to Labor Law § 240 (1) and therefore as to liability; for the completeness of analysis, plaintiff's motion as to Labor Law § 241 (6) is denied.

This constitutes the decision and order of the court.

August 31, 2023
**DATE**

**DEVIN P. COHEN**
Justice of the Supreme Court

[Decision and order resolving motion sequence 003 in *Greaves v Northeastern Conference Corporation of Seventh-Day Adventists*, Index 518040/2020.]