SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

Justice

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INDEX NO. 156061/2019

JUAN GUZMAN SAQUISILI,
Plaintiff,

MOTION SEQ. NO. 001

- v -

HARLEM URBAN DEVELOPMENT CORPORATION, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, EMPIRE STATE DEVELOPMENT CORPORATION, 223 WEST 125TH STREET DANFORTH LLC, and FLINTLOCK CONSTRUCTION SERVICES LLC,
Defendants.

DECISION + ORDER ON MOTION

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HARLEM URBAN DEVELOPMENT CORPORATION, NEW YORK STATE URBAN DEVELOPMENT CORPORATION, EMPIRE STATE DEVELOPMENT CORPORATION, 223 WEST 125TH STREET DANFORTH LLC and FLINTLOCK CONSTRUCTION SERVICES LLC,
Third-Party Plaintiffs,

-against-

SKY MATERIALS CORP.,
Third-Party Defendant.

Third-Party
Index No. 595074/2020

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 65, 67, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for **SUMMARY JUDGMENT**.

Plaintiff, a construction worker, commenced this action via summons and complaint against defendants who own and operate the building located at 233 West 125th Street, New York, New York ("premises"), alleging that on September 20, 2018, while doing construction work at the premises, he fell from an elevated work location due to the absence of the required protection for construction workers, and was seriously injured as a result. Plaintiff now seeks damages based on negligence (first cause of action). Plaintiff further alleges that by failing to ensure that the worksite was so equipped and operated as to provide reasonable and adequate protection and safety to plaintiff, defendants are strictly liable to plaintiff for his injury in violation of §§ 200; 240; 241(3), 241(4), 241(5); and 241(6) of the Labor Law of the State of New York and provisions of the Industrial Codes and OSHA Regulations (second cause of action) (NYSCEF Doc. No. 1, *summons and complaint*).

In their answer, defendants deny plaintiff's allegations and set forth the following affirmative defenses: that claims premised on Labor Law should be dismissed as a matter of law because plaintiff acted as a recalcitrant worker at the time and place of the subject accident, and therefore, his conduct was the sole proximate cause of his accident (first affirmative defense); that plaintiff's recovery should be reduced based on plaintiff's proportion of culpable conduct that led to his accident (second affirmative defense); that defendants are entitled to protection under General Obligations Law § 15-108 in the event that any person or entity liable or alleged to be liable for plaintiff's injury has been given or may hereafter be given a release or covenant not to sue (third affirmative defense); defendants assert the limitations contained in CPLR 1601 and 1602 (fourth affirmative defense); and, that plaintiff's past or future medical expenses or economic losses incurred and confirmed with reasonable certainty be replaced or indemnified in whole or in part from collateral sources as defined in CPLR 4545(c) (fifth affirmative defense) (NYSCEF Doc. No. 13, *amended answer to verified complaint*).

Defendants filed a third-party complaint against Sky Material Corp. ("Sky"), as Sky had allegedly entered into an agreement with defendants to perform construction work at the premises (NYSCEF Doc. No. 14, *third-party complaint, ¶13-14*). Defendants allege that they are entitled to: contractual indemnification from Sky because it had agreed to defend and indemnify defendants for construction accidents that occurred at the premises (first cause of action); common-law indemnification and/or contribution because if plaintiff's allegation are true, then Sky's acts of commission and omission caused them (second cause of action); and a breach of contract remedy because Sky agreed to procure a Comprehensive General Liability Insurance policy and name defendants as additional insureds under same, and that plaintiff's alleged injury sustained is within the provisions of the insurance (third affirmative defense) (*id.*, at ¶*20-33*).

Plaintiff now moves the court, pursuant to CPLR 3212, for an order granting summary judgment in his favor and against defendants for violating Labor Law §§ 240(1) and 241(6). Plaintiff argues that defendant Harlem Community Development Corporation ("HCDC"), a subsidiary of defendant Empire State Development Corporation ("EDC"), owns the premises and leased same to defendant Danforth, who in turn entered into a contract with defendant Flintlock Construction Services LLC ("Flintlock"). Flintlock hired third-party defendant and plaintiff's employer, Sky, to perform construction work at the premises (NYSCEF Doc. No. 36, *affidavit in support of summary judgment, ¶8-9*). Plaintiff contends that on the day of the accident, he was performing carpentry work on a 6th floor deck and that, although he was wearing a harness with a yo-yo (lanyard), there was no place for him to tie-off. He asserts that on the date of the accident, he was instructed to retrieve wooden planks measuring 2 x 3 feet ("wooden planks") stored in another area on the 6th floor deck, and then bring same back to Licandro Pico, his coworker, to install on the floor. Plaintiff claims that there was an approximately 3-foot wide and 3-foot-deep opening across the length of the floor (beam pocket), and in the course of his work, it was necessary for him to traverse over the beam pocket while carrying the wooden planks over to Pico. Plaintiff avers that on one of the trips, he tripped over metal debris and fell into the beam pocket (*id.*, at ¶13-15). Plaintiff sets forth that the metal debris he tripped over had been littered on the 6th floor for 3-4 days prior to his injury and that the foreman had been notified of same. That said, plaintiff asserts that defendants' violation of Labor Law § 240(1) is twofold: first, that the opening in the floor deck was completely unguarded; and secondly, the failure to guard or

cover the beam pocket amounts to failure to provide him an adequate safety device to prevent him from falling into the unguarded opening, and same was the proximate cause of his injury (*id.*, at ¶33). Plaintiff claims that his own testimony and that of Pico establish that the floor deck opening was not guarded at the time of the accident, and the Department of Building's ("DOB") report after investigating plaintiff's fall at the premises concluded that the "opening should have been protected either by covering or rail to prevent the accident" (*id.*, at ¶20-21). Plaintiff further sets forth that he is entitled to summary judgment pursuant to Labor Law § 241(6) for defendants' violation of New York State Industrial Code § 23-1.7(b)(1)(i) which requires that there be a substantial covering over every hazardous opening into which a person may step or fall, and § 23-1.7(e)(2) which requires that floors or platforms be kept free from dirt and debris insofar as defendants failed to cover the beam pocket through which he fell, and likewise failed to clean the floor of the metal debris that he tripped over (*id.*, at ¶48, 50-51). Plaintiff also asserts that further discovery is not necessary as the evidence is clear and undisputed, especially since a worker's contributory negligence is not a defense to a Labor Law § 240(1) claim (*id.*, at 54).

In opposition, defendants argue that summary judgment is premature because of the outstanding depositions of Pico and that of third-party defendant, Sky, whose deposition will elicit information about supervision, direction and control over plaintiff's work on the date of accident. Defendants contend that such deposition will provide relevant information pertaining to the size and depth of the opening in the roof deck and whether the opening was required to be covered and/or guarded. (NYSCEF Doc. No. 70, *affirmation in opposition, ¶40*). They further assert that plaintiff lacks credibility because he testified under oath that "he did not have any prior personal injury lawsuits, nor that he injured, prior to the date of this accident, his right knee and lower back", which is rebutted by available evidence evincing that he was involved in a car accident in 2013 and was also treated for his right knee and lower back (*id.*, at ¶48).

They also posit that there is a question of fact about the accident because the available accidents reports indicate that plaintiff merely fell while walking around the deck opening, but not that he fell into the opening. Hence, defendants maintain that plaintiff rather tripped near the opening, a scenario that does not fall within the ambit of Labor Law § 240(1) and that even if plaintiff's version of the event is true, Labor Law § 240(1) does not apply to plaintiff's fall because he did not fall into the opening (*id.*, at ¶54-55, 60-61). They assert that plaintiff was the sole cause of his injuries because a photograph taken immediately after the accident shows the floor free from debris, belying plaintiff's claim that the deck had debris on it. Defendants also contend that contrary to plaintiff claim that it was necessary for him to traverse the beam pocket, the photographs produced by Sky show plaintiff could have walked over a wooden plank and was not required to step over the beam pocket as alleged, and therefore, the photograph, at a minimum, creates an issue of fact as to whether plaintiff chose not to use adequate safety devices available to him (*id.*, at ¶76). Concerning plaintiff's Labor Law § 241(6) and Industrial Codes 23-1.7(b)(1)(i) and 23-1.7(e)(2) claims, defendants set forth that such claims must be denied because it is for a jury to decide whether a violation of Labor Law § 241(6) constituted negligence and was a proximate cause of plaintiff's accident, and the available photographs contradict plaintiff's assertion that debris caused him to trip and fall into the opening (*id.*, at ¶83, 96).

Sky also filed opposition to plaintiff's summary judgment motion in which it asserts that it is out of business and investigators have made several unsuccessful attempts to contact its principal and former employees to give deposition testimony. It, however, argues that plaintiff's motion for summary judgment should be denied because there remain issues of fact as to whether plaintiff fell into the deck opening (NYSCEF Doc. No. 79, *affirmation in opposition,* ¶7).

In reply, plaintiff contends that his motion for summary judgment is not premature because his own sworn testimony, supported by an eyewitness affidavit, and confirmed by photographs, and the certified DOB citation present clear and undisputed evidence that there is no issue of fact. He argues that defendants have failed to proffer a bona fide evidentiary basis to suggest that further discovery will establish a material issue of fact precluding summary judgment (NYSCEF Doc. No. 81, *reply, ¶5, 19, 33*). Plaintiff maintains that regardless of defendants' claim to the contrary that he did not trip on metal debris before falling in the deck opening, it remains materially uncontroverted that the defendants' failure to guard the beam pocket or otherwise protect the plaintiff from falling therein, was the proximate cause of the incident (*id.*, at ¶24).

It is well-settled that the 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212[f]; *see Zuckerman*, 49 NY2d at 562).

Labor Law § 240(1), also known as the Scaffold Law, provides, as relevant:

> "All contractors and owners and their agents . . . 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) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer and Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "was designed to prevent those types of accidents in which the scaffold . . . 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" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

The absolute liability found within section 240 "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240(1) "must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]).

That said, not every worker who is injured at a construction site is afforded the protections of Labor Law § 240(1), and "a distinction must be made between those accidents caused by the failure to provide a safety device . . . and those caused by general hazards specific to a workplace" (*Makarius v Port Auth. of N.Y. & N. J.*, 76 AD3d 805, 807 [1st Dept 2010]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240(1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"). Instead, liability "is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

Therefore, to prevail on a section 240(1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

Labor Law § 241(6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents, . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
> * * *
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241(6) imposes a nondelegable duty of reasonable care upon owners and contractors "'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501–502 [1993]). Importantly, to sustain a Labor Law § 241(6) claim, it must be shown that the defendant violated a specific, "concrete" implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*Ross*, 81 NY2d at 505). Such violation must be a proximate cause of the plaintiff's injuries (*Annicaro v Corporate Suites, Inc.*, 98 AD3d 542, 544 [2d Dept 2012]).

Industrial Code 12 NYCRR 23-1.7(b)(1)(i) governs "Hazard Openings", which provides, in pertinent part, the following:

> "Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

Industrial Code 12 NYCRR 23-1.7(e)(2) which governs "Tripping and other hazards" in passageways provides, in pertinent part, the following:

> "The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed."

Concerning that portion of plaintiff's motion seeking summary judgment against defendants for their alleged violation of Labor Law § 240(1), although plaintiff tenders his own sworn testimony, the affidavit of coworker Pico and the DOB's investigation file, an issue of material fact exists as to whether the floor deck opening should have been covered or guarded in the first place. The depositions of Pico and Sky remain outstanding and, without Sky's deposition, this court cannot ascertain whether the opening in the roof deck was integral to the work being done on the 6th floor on the date of plaintiff's accident, and therefore, whether it was required that it be guarded or covered to prevent plaintiff's fall (see *Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]; *Versace v 1540 Broadway L.P.*, 148 AD3d 483, 484 [1st Dept 2017]). Specifically, plaintiff testified at his deposition that Sky's carpenters created the beam pocket, and hence, it is necessary to determine the reason it was created, and if leaving it unguarded was in line with the work being done of the 6th floor on the date of the accident (NYSCEF Doc. No. 39, *plaintiff deposition transcript of January 6, 2021, page 201*). Furthermore, there is a material issue of fact as to whether the beam pocket into which plaintiff legs fell posed an elevation-related hazard, rather than an ordinary hazard at a construction site, which is not covered by Labor Law § 240(1) (see *Coaxum v Metcon Constr., Inc.*, 93 AD3d 403, 404 [1st Dept 2012]). There is conflicting evidence concerning the size and whether the depth of the hole was sufficient to render it a gravity-related hazard within the meaning of Labor Law § 240(1). "[L]iability arises under Labor Law § 240(1) only where the plaintiff's injuries are the direct consequence of an elevation-related risk . . . not a separate and ordinary tripping or slipping hazard" (*Nicometi v Vineyards of Fredonia, LLC,* 25 NY3d 90, 98-99 [2015]; *see also Settimo v City of New York,* 61 AD3d 840, 841 [2d Dept 2009] [slip and fall down a slope "did not involve an elevation-related risk"]). Accordingly, that branch of plaintiff's motion for summary judgment based on defendants' alleged violation of Labor Law § 240(1) is denied.

Plaintiff's Labor Law § 241(6) cause of action, predicated on a violation of 12 NYCRR § 1.7(b)(1)(i) fails for similar reasons. Even assuming, arguendo, that the unguarded beam pocket here constituted a "hazardous opening," with the record as presently developed, it cannot be reasonably interpreted to apply here without first establishing that protecting the opening in question would have been inconsistent with the work being done on the 6th floor on the date of the accident (see *Salazar*, 18 NY3d at 140]). Secondly, concerning the alleged violation of Industrial Code 12 NYCRR 23-1.7(e)(2), to the extent plaintiff has established his *prima facie* entitlement to summary judgment by positing that the metal debris caused his accident at the premises, defendants have established that an issue of material fact exists as to such claim by proffering a photograph taken immediately after plaintiff's accident, evincing that the floor was

clear of metal debris that could have contributed to plaintiff's fall. Given the conflicting claims about whether the metal debris caused plaintiff's accident at the site, any determination would be based on the credibility of the parties, and credibility determination is not appropriate on a motion for summary judgment (see *St. Marks Assets, Inc. v Sohayegh*, 167 AD3d 458, 459 [1st Dept 2018], citing *DeSario v SL Green Mgt. LLC*, 105 AD3d 421, 422 [1st Dept, 2013]). Therefore, the court denies that branch of plaintiff's motion seeking judgment against defendants for violation of Labor Law §241(6).

All remaining arguments and requests have been considered and are either without merit or need not be addressed given the findings above. It is hereby

ORDERED that that branch of plaintiff's summary judgment motion seeking judgment against defendants for alleged violation of Labor Law § 240(1) (first cause of action) is denied; and it is

ORDERED that that branch of plaintiff's summary judgment motion seeking judgment against defendants for alleged violation of Labor Law § 241(6) (second cause of action) is denied; and it is

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants.

This constitutes the decision and order of this court.

September 14, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**