SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46M**

Justice

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NELY GONZALEZ INTERIANO,

Plaintiff,

- v -

SILVERSTEIN GALAXY PROPERTY OWNER, LLC,SILVERSTEIN PROPERTIES, INC.,THE WALT DISNEY COMPANY, AMERICAN BROADCASTING COMPANIES, INC.,

Defendant.

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INDEX NO. 157311/2019

MOTION DATE 03/01/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

SILVERSTEIN GALAXY PROPERTY OWNER, LLC, AMERICAN BROADCASTING COMPANIES, INC.

Plaintiff,

-against-

STIGER CONSTRUCTION, INC.,

Defendant.

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Third-Party
Index No. 595089/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

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

Plaintiff moves to amend her complaint to add a cause of action under Labor Law § 240 (2) and for summary judgment on liability against defendants/third-party plaintiffs Silverstein Galaxy Property Owner, LLC and American Broadcasting Companies, Inc. under Labor Law § § 240 (1), 240 (2), and 241 (6).

Silverstein Galaxy Property Owner, LLC ("Silverstein") and American Broadcasting Companies, Inc. ("American") are named as the owners of the construction site where plaintiff was injured. Third-party defendant Stiger Construction, Inc. ("Stiger") was plaintiff's employer. Plaintiff alleges that, on December 22, 2018, while working on a scaffold, she fell onto the floor of the scaffold, and sustained injuries.

THE PARTIES' ALLEGATIONS

Plaintiff's first day on the construction site was December 21, 2018. Before starting work, plaintiff understood that her job was to clean away construction debris from under a scaffold. When she came to work, she and another Stiger employee were assigned to demolish the exterior wall of a building while standing on an elevated scaffold. Plaintiff had never been on a scaffold before. She told this to her supervisor, "David", and he told her that "my coworker was going to manage the whole thing. And I would only have to help him" (NYSCEF 40, Plaintiff transcript [tr] at 89) and that "I was going to have to help him pick up the garbage, be on the scaffold" (*id.* at 126).

Plaintiff and her coworker worked the full day on a scaffold. Plaintiff's primary job was cleaning up debris that fell from the building onto the scaffold (Plaintiff tr at 114, 203). She was "helping [her coworker] pick up and sometimes helping him demolishing" (*id.* at 91). A motor on the scaffold moved it up and down the side of the building. Plaintiff alleges that when the scaffold reached the level where the work was performed, it should have been tied to the building to secure it in place. To secure the scaffold, wires attached to the building had to be tied to ropes on the scaffold. About five or six times, the wind caused the scaffold to move backwards and about two or three feet away from the building. Plaintiff asked her co-worker to tie the scaffold because it was moving too much. The co-worker did not tie the ropes to the wires. The coworker "didn't want to or he didn't like to secure the scaffold and it was shaking a lot" (*id.* at 133). She asked him why he wasn't tying it up and he said, "that nothing was wrong and everything was okay" (*id.* at 137). She knew the ropes had to be tied but she didn't know how to do it (*id.*).

On the following day, December 22, 2018, before going on the scaffold, plaintiff told her supervisor that she was concerned because the scaffold moved a lot, that her co-worker did not tie it, and that she was afraid. Her supervisor told her to work that day because an employee that was supposed to come in was absent. He did not say anything to her about tying off the scaffold (Plaintiff tr at 216).

The scaffold was raised up to the fourth floor of the building. The wind and the co-worker's use of a drill on the side of the building caused the scaffold to sway away from the building. Plaintiff asked her co-worker to tie the scaffold onto the wall, but he did not. The scaffold swung away from the building causing plaintiff to lose her balance. This time the

movement was stronger than plaintiff had anticipated, faster than on previous occasions. Plaintiff fell backwards and her right arm and back hit the scaffold poles. Then she fell forward onto the surface of the scaffold.

Those two days she did not tie off the scaffold because she did not know much about scaffolds, "about tying" (Plaintiff tr at 216). She knew it should have been tied but she did not do it because her coworker "would not allow it. He would say that that was okay. He was more than I" (*id.* at 216-217). The questioner said, "Meaning that he was a higher ranked employee than you? Is that what you mean, ma'am?" Plaintiff replied, "More time, of course" (*id*. at 217). After the lunch break, when the scaffold moved, she brought up tying the scaffold to her coworker "because he could see that I was afraid. I would tell him, why don't you tie it down? And he would say, don't worry" (*id*. at 232-233). She volunteered to tie it herself and he said "Look, I do not have the harness tied and I'm not afraid." (*id*.at 233). "Yes, that is what he told me one time that I tried to tie the scaffold" (*id*. at 234). She pointed out to him that their coworkers who were working on elevated scaffolds had tied the scaffolds and he said, "Again you're starting with that?" (*id.* at 236).

Defendants' counterstatement of material facts states that, before starting work, plaintiff, as she acknowledged during her deposition, completed the required OSHA course where she learned about scaffold safety, such as wearing a safety harness and tying off to a secure point. She knew that once the scaffold moved up to a working level it had to be tied off. On the day before the accident, plaintiff told her co-worker to tie the scaffold onto the building. She did not tie it down herself although she knew it had to be tied off. Plaintiff was provided with all necessary safety equipment including a harness with an attached lanyard. She was instructed to tie her harness onto a cable above the scaffold and she testified that she was wearing her harness and that it was tied off at the time of the accident, and that her lanyard and harness were functioning properly at the time of her injury.

In his affidavit, Jose David Gutama, plaintiff's foreman on the construction project, states that, on the day of the accident and the previous day, plaintiff and the other Stiger employees were told to tie off the scaffold when they were at a working level. Tying off would have prevented the scaffold from swaying. Plaintiff made no complaints about the condition of the suspended scaffold prior to her accident.

MOTION FOR SUMMARY JUDGMENT ON LABOR LAW § 240 (1)

Labor Law § 240 (1) provides as follows.

> 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.

To obtain summary judgment on § 240 (1), a plaintiff must proffer evidence which demonstrates that adequate protection from the gravity-related risk of her construction work was not provided, that this failure to provide protection constituted a violation of the statute, and that the violation was a proximate cause of her accident (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Similarly, with regard to § 241 (6), the plaintiff must show that the violation of an Industrial Code regulation was a proximate cause of her accident (*Torres v New York City Hous. Auth.,* 199 AD3d 852, 854 [2d Dept 2021]).

Proximate cause exists where the violation of the statute or regulation was a contributing or substantial cause of the accident (*Blake,* 1 NY3d at 287; *Maniscalco v New York City Tr. Auth.,* 95 AD3d 510, 512 [1st Dept 2012]). Defendants would be relieved of liability on the § 240 (1) claim only if plaintiff were the sole proximate cause of her accident (*Barreto v Metropolitan Transp. Auth.,* 25 NY3d 426, 433 [2015]; *Tate v Clancy–Cullen Stor. Co.* , 171 AD2d 292, 296 [1st Dept 1991]). Comparative negligence is not a defense to liability on § 240 (1), while it is a defense to liability on § 241 (6) (*Spages v Gary Null Assocs., Inc.*, 14 AD3d 425, 426 [1st Dept 2005]).

Plaintiff shows that the failure to secure the scaffold was in violation of § 240 (1), that because it was not secured, the wind caused it to move, and the movement caused plaintiff to fall. Anticipating defendants' opposition, plaintiff contends that § 240 (1) applies to her case although she fell onto the ground of the scaffold, rather than off the scaffold. Defendants argue

that the statute applies only to workers who fall from an elevated height and not to workers who fall on the scaffold, rather than off the scaffold.

The purpose of § 240 (1) is to protect workers against elevation-related hazards, namely, "the exceptionally dangerous conditions posed by elevation differentials at work sites" (*Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491 [1995]). Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no § 240 (1) liability exists (*Melber v 6333 Main St.,* 91 NY2d 759, 763-764 [1998]). "There is no bright-line minimum height differential that determines whether an elevation hazard exists" (*Auriemma v Biltmore Theatre, LLC,* 82 AD3d 1, 9 [1st Dept 2011]). The worker need not fall completely off an elevation device to the ground for § 240 (1) liability to attach (*Montalvo v J. Petrocelli Constr., Inc.,* 8 AD3d 173, 174-175 [1st Dept 2004]). The statute applies if the worker is injured by a gravity-related accident, even if he/she did not actually fall (*Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561, 563 [1st Dept 2011]), provided that the injury results from the inadequacy of a safety device (*Ortiz v Varsity Holdings, LLC,* 18 NY3d 335, 340 [2011]).

Plaintiff cites a case where § 240 (1) liability was found although the worker did not fall off the scaffold. The worker was on a suspended scaffold attempting to move the scaffold to avoid an air conditioning unit protruding from the building, and the unit smashed his wrist (*Dominguez v Lafayette-Boynton Hous. Corp.,* 240 AD2d 310, 311 [1st Dept 1997]). "Since the effects of gravity caused the scaffold to smash into the air conditioner, and the scaffold was not equipped with sufficient devices to prevent these injuries, plaintiffs' motion for summary judgment should have been granted" (*id*. at 312).

In a recent First Department case, the worker established a prima facie case for summary judgment on § 240 (1) through his testimony that he had no place to tie off his harness while he was standing on a steel tube above the ground, and the tube shifted causing him to fall backward onto another tube on the same level (*Ging v F.J. Sciame Constr. Co., Inc.,* 193 AD3d 415, 416-417 [1st Dept 2021]). § 240 (1) liability was present although the worker did not fall to a lower level. Another plaintiff was entitled to summary judgment on § 240 (1), although his injuries resulted directly from his fall on the float stage (a vessel made of wooden planks) on which he was standing, rather than off the float stage, inasmuch he fell while struggling to avoid the elevation-related risk of falling into the water (*Pipia v Turner Constr. Co.,* 114 AD3d 424, 426-

427 [1st Dept 2014]. § 240 (1) applied to the following cases. In *Suwareh v State of New York* (24 AD3d 380, 380–81 [1st Dept 2005]), the worker was hauling a bucket of hot tar up to a roof with a rope. The bucket became stuck on a ledge. While trying to free the bucket, the worker lost his balance, leaned back so as not to fall off the roof, and lost control of the bucket, which spilled hot tar onto his feet (*see also Mendoza v Highpoint Assocs., IX, LLC*, 83 AD3d 1, 12 [1st Dept 2011] [worker's accident was caused by the effects of gravity as he lost his balance and landed on his knee when the "flimsy, unstable" roof started to "buckle" and "sink" underneath his feet]).

In another case, the plaintiff was ascending to the top of a building on a suspended scaffold. The scaffold swung into a recessed area. To clear the recess, plaintiff pressed his back against the wall and pushed with his legs to push the scaffold out and injured his back (*Galvez v Columbus 95th St. LLC*, 161 AD3d 530, 530 [1st Dept 2018]). The accident fell within § 240 (1) because the force of gravity caused the scaffold to swing into the recessed area, necessitating that plaintiff use his back to exert force to swing the scaffold out again and the scaffold proved inadequate to shield plaintiff from "harm directly flowing from the application of the force of gravity to an object or person" (*id.* at 531, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). The plaintiff in *Galvez* was not granted summary judgment on § 240 (1), because an issue of fact existed as to whether his negligence was the sole proximate cause of his injuries. Evidence conflicted as to whether plaintiff had been instructed to push off the scaffold in the manner described.

In the instant case, plaintiff's fall resulted from a danger related to the elevation related risk that brought about the need for the scaffold to be secured in the first place (*see Melber*, 91 NY2d at 764; *compare Reyes v Magnetic Constr., Inc.*, 83 AD3d 512, 513 [1st Dept 2011] [§ 240 (1) did not apply, since the worker's fall resulted from a hazard wholly unrelated to the risk which brought the need for the stairs in the first instance]). An obvious purpose of § 240 (1) is to give workers a steady footing on which to work when standing on an elevated scaffold, which is inherently a risky activity. Here, the scaffold was at risk of being rendered unsteady by the wind. Plaintiff shows that her "injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner,* 13 NY3d at 603).

Whether a particular condition presents an elevation related hazard can be determined as a matter of law (*see DeStefano v Amtad N.Y.,* 269 AD2d 229, 229 [1st Dept 2000]). The court finds that plaintiff encountered such a hazard, that the scaffold did not provide proper protection, and that she is entitled to summary judgment on her § 240 (1) claim.

Defendants argue that plaintiff's failure to tie the scaffold to the building when the necessary equipment was available creates an issue of fact regarding whether plaintiff herself is the sole proximate cause of the incident. They contend that plaintiff had been trained how to tie off, that her supervisor instructed her to tie off, and that her refusal shows that she was a recalcitrant worker. Defendants further claim that there is a question of fact regarding whether plaintiff's co-worker is the sole proximate cause of plaintiff's injuries, in that his refusal to tie off constituted an unforeseeable, intervening, superseding act of negligence, erasing defendants' liability.

A defendant is liable for all the normal and foreseeable consequences of its negligent acts (*Gordon v Easter Ry. Supply*, 82 NY2d 555, 562 [1993]). "Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed" (*Derdiarian v Felix Contr. Corp.,* 51 NY2d 308, 315 [1980]; *see Liberty Mut. Ins. Corp. v New York Marine & Gen. Ins. Co*., 505 F Supp 3d 260, 272 [SD NY 2020]). An intervening act severs the causal connection between defendant's conduct and plaintiff's injury if it is "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct" (*Derdiarian,* 51 NY2d at 315; *Fahey v A.O. Smith Corp.*, 77 AD3d 612, 616 [2d Dept 2010]). In that case, the intervening act becomes a superseding cause of the accident, sufficient to relieve a defendant of liability (*id.*).

In this case, the coworker's decision not to tie off the scaffold was not extraordinary; it was foreseeable that a worker could decide not to secure a scaffold. The coworker's actions did not constitute conduct "so reckless or unforeseeable that it is unreasonable to hold the defendant responsible for the resulting damages" (*Miller v Town of Fenton*, 247 AD2d 740, 741 [3d Dept 1998]). Generally, the trier of fact decides whether an act is foreseeable (*Lynch v Bay Ridge Obstetrical & Gynecological Assoc.,* 72 NY2d 632, 636 [1988]). Nonetheless, summary judgment is appropriate "where only one conclusion may be drawn from the established facts" (*Derdiarian*, 51 NY2d at 315; *Geralds v Damiano,* 128 AD3d 550, 551 [1st Dept 2015]) and

where the question of legal cause may be decided as a matter of law (*Haibi v 790 Riverside Dr. Owners, Inc.,* 156 AD3d 144, 147 [1st Dept 2017]; *Robinson v East Med. Ctr., LP,* 6 NY3d 550, 555 [2006]). In this case, defendants present no facts from which to conclude that the coworker's actions constituted an extraordinary unforeseeable act (*see Susko v 337 Greenwich LLC,* 103 AD3d 434, 435 [1st Dept 2013]).

This case is analogous to *Tennant v Curcio* (237 AD2d 733, 733 [3d Dept 1997]), where summary judgment on § 240 (1) was granted to the plaintiff, whose fall off a ladder was attributed to the absence of a device to keep the ladder from sliding to the side. The plaintiff was assigned to help a coworker, who decided that the ladder they were using did not need to be secured. The court held that, "to the extent that [the coworker] assumed the role (if not the title) of plaintiff's worksite supervisor, it is clear from the record that plaintiff had no reasonable alternative but to acquiesce in the judgment exercised by the person with immediate control over his work" (*id*., 734). The co-worker oversaw the work, whereas the plaintiff, as the laborer, was there to assist in completing the work. Plaintiff was operating under the co-worker's direction and control and "was effectively forestalled by [the coworker's] decision that there was no need to secure the ladder to the building. Simply stated, plaintiff had no choice in the matter and, as such, cannot be found to have 'refused'" to use a safety device (*id.*, 735).

In the instant case, plaintiff testified that her supervisor told her that she was there to help the co-worker and that she was not able to countermand him because his position was superior to hers. That she would have had to act in opposition to him to secure the scaffold is a reasonable inference to be drawn from her testimony.

In contrast to *Tennant,* summary judgment was denied to the plaintiff in a case involving a co-worker who denied the plaintiff's request for access to a safety device (*Thomas v North Country Fam. Health Ctr., Inc.,* 208 AD3d 962, 963-64 [4th Dept 2022]). The court ruled that there was a question of fact as to whether the plaintiff's failure to use the appropriate equipment, the scissor lift, was the sole proximate cause of the accident (*id.,* 963). Plaintiff's submissions raised a question of fact whether plaintiff "chose for no good reason" to use the ladder instead of the scissor lift (*id.*).

In this case, defendants do not refute plaintiff's allegations that she felt unable to secure the scaffold, as her co-worker had more authority than she did. Defendants have not alleged any facts tending to show that plaintiff chose for no good reason not to secure the scaffold. This case

does not raise a triable issue whether plaintiff was the sole proximate cause of her accident. There may be more than one proximate cause for an accident (*Wiscovitch v Lend Lease (U.S.) Constr. LMB Inc.,* 157 AD3d 576, 578 [1st Dept 2018]). At most, any liability on plaintiff's part would be comparative negligence, which is not a defense to § 240 (1). Also, where a statutory violation is a proximate cause of an accident, as in the instant case, the plaintiff cannot be solely to blame for it (*see Blake*, 1 NY3d at 290). In addition, to the extent that the co-worker's conduct was a proximate cause of the accident, it would be impossible for plaintiff's own failure to tie the scaffold to be the sole proximate cause.

Nor do defendants raise an issue of fact as to whether plaintiff was a recalcitrant worker, ineligible for protection under § 240 (1). A defendant can raise a triable issue of fact as to whether plaintiff was a recalcitrant worker by demonstrating that the worker (1) had appropriate safety devices available, (2) knew that said devices were available and that he or she was expected to use them, (3) chose for no good reason not to use them, and (4) would not have been injured had he or she not made that choice (*Cahill v Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 40 [2004]; *see Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]).

The recalcitrant worker defense requires a showing that the injured worker refused to obey a direct and immediate order to use available safety devices (*Vitucci v Durst Pyramid LLC,* 205 AD3d 441, 444 [1st Dept 2022]; *Phillips v Powercrat Corp.*, 126 AD3d 590, 591 [1st Dept 2015]). The worker in *Cahill* was deemed recalcitrant, inasmuch as he disregarded specific instructions to use a safety line while climbing. Here, there is no evidence that plaintiff deliberately refused to use a safety device. A general instruction to use a safety device, such as given by the supervisor in this case, is insufficient to create a factual issue (*Tennant,* 237 AD2d at 734-735; *see Vitucci v Durst Pyramid LLC,* 205 AD3d 441, 444, [1st Dept 2022] [defendants did not show that "plaintiff deliberately refused to obey a direct and immediate instruction to use an available safety device . . . so as to invoke the recalcitrant worker defense"]).

Since plaintiff is entitled to summary judgment as to liability on her § 240 (1) claim, the issue of § 241(6) or to amend to bring a cause of action under § 240(2) is academic (*see Corleto v Henry Restoration Ltd*., 206 AD3d 525, 526 [1st Dept 2022]; *Jerez v Tishman Constr. Corp. of N.Y.,* 118 AD3d 617, 617-618 [1st Dept 2014]; *Auriemma,* 82 AD3d at 12 [plaintiff's damages are the same under any of the theories of liability and he can only recover once]).

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment against defendants Silverstein Galaxy Property Owner, LLC and American Broadcasting Companies, Inc. for liability on Labor Law § 240 (1) is granted, and it is further

ORDERED, that the remaining branches of plaintiff's motion are denied as academic.

This constitutes the decision and order of the Court.

9/20/2023	
DATE	RICHARD LATIN, 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