SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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DIEGO RODRIGUEZ,

Plaintiff,

- v -

YWA-AMSTERDAM LLC,THE RINALDI GROUP OF NEW YORK, LLC,

Defendant.

INDEX NO. 151259/2020

MOTION DATE 02/24/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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YWA-AMSTERDAM LLC, THE RINALDI GROUP OF NEW YORK, LLC

Plaintiff,

-against-

PRIME STRUCTURE INC, NEIVA CONSTRUCTION CORP

Defendant.

Third-Party
Index No. 595658/2020

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 72, 74, 75

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

In this Labor Law action, plaintiff Diego Rodriguez moves for summary judgment pursuant to CPLR 3212 against defendants YWA-Amsterdam LLC and The Rinaldi Group of New York, LLC ("Rinaldi Group") (collectively, "Defendants") on his Labor Law §§ 240(1) and 241(6) causes of action. Defendants oppose the motion.

Plaintiff was a carpenter employed with third party defendant Neiva Construction Corp on November 7, 2019 and had been working in the sub-cellar at the Radio Tower & Hotel at

2420 Amsterdam Avenue in Manhattan ("the premises"). YWA-Amsterdam LLC was the owner of the premises and Rinaldi was the construction manager.

Plaintiff was working under the direction of Wilson Palawachi, Neiva Construction Corp.'s on-site supervisor. His work on the day of the accident involved placing "jacks" – 10-12-foot-long pieces of wooden pole – as part of constructing a superstructure in the sub-basement. The jacks were placed on metal feet, and, once they were positioned, metal beams would be placed on top of the jacks. Plaintiff testified that it was standard practice to secure the beams to the jacks. While measuring the gap between certain jacks, Plaintiff noticed a hose under one of the feet. Plaintiff then lifted the jack and foot about two inches and attempted to move the hose out of the way. As he lifted the jack, the unsecured beam on top came loose and fell 10-12 feet, hitting his left shoulder and back and causing injuries (NYSCEF Doc. No. 61, Plaintiff EBT, at 44-45).

Plaintiff commenced this action on February 4, 2020 asserting claims under Labor Law §§ 200, 240(1), and 241(6). He now moves for summary judgment on his Labor Law §§ 240(1) and 241(6) causes of action.

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Should the movant make its prima facie showing, the burden shifts to the opposing party, who must then produce admissible evidentiary proof to establish that material issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiff argues that he is entitled to summary judgment on his Labor Law § 240(1) cause of action because there is no dispute of fact as to whether he was injured by a falling beam, that no safety device was provided to protect him from falling objects, and that there is no evidence that he was either a recalcitrant worker or otherwise the sole proximate cause of his accident. Labor Law § 240(1) "places a nondelegable duty on owners, contractors, and their agents to furnish safety devices giving construction workers adequate protection from elevation-related risks" (*Hill v City of New York*, 140 AD3d 568, 569 [1st Dept 2016]). Elevation-related risks include injuries caused by falling objects (*Quattrocchi v F.J. Sciame Constr. Corp.*, 44 AD3d 377, 379-380 [1st Dept 2007]). "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 Exch., Inc.*, 13 NY3d 599, 603 [2009]). Liability will not attach where a "plaintiff's actions [are] the sole proximate cause of his injuries" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 600 [1998]). "[A]n injured worker's failure to use safety devices will not constitute the sole proximate cause of the accident unless the worker knew that he or she was expected to use them but for no good reason chose not to do so" (*Anderson v MSG Holdings, L.P.*, 146 AD3d 401, 404 [1st Dept 2017] [internal citation and quotation marks omitted]).

Here, Plaintiff has established his prima facie entitlement to summary judgment by presenting undisputed testimony that he was hit by an unsecured beam that fell from the jack on which it had been placed. It is further undisputed that Plaintiff lifted the jack to move a hose that was underneath the foot of the jack. Plaintiff also testified that he believed that the beams on top of the jacks had been previously secured, as was the common practice: "So they're secure by, like, a cross [sic] two by four and then brackets but even with that I told – Wilson [Palawachi]

told me not to worry about that. That other people were going [to] come and do it. To just continue working" (Plaintiff EBT at 36). Defendants contend that there is a triable issue of fact as to whether Plaintiff was the sole proximate cause of his accident. They point to Plaintiff's testimony to argue that he ignored an instruction from another worker to leave the hose in place and to not move the jack.

The Court finds that Defendants fail to demonstrate the existence of a material issue of fact with respect to the issue of sole proximate cause. Plaintiff testified to the following exchange with unidentified coworkers immediately before his accident:

> Q: Did anyone specifically tell you to move the hose?
> A: Well, no. I mean my job was to place the jack so when came [sic] to place it I told the guy[s] why did they place the supports there when there was a hose there. That was in my way.
> Q: The hose was in your way?
> A: Yes
> Q: You said you spoke to a guy about the hose being in your way. Did he tell you to move the hose?
> A: No. I mean they didn't really pay attention. They didn't listen. They just said leave it there but it was in my way because I needed to get my work done.
> Q: So then you proceeded to attempt to move the hose, correct?
> A: Yes.

(Plaintiff EBT at 42-43). Plaintiff did not testify as to whether his supervisor, Wilson Palawachi, provided any instructions about moving the hose, but did testify that Palawachi was the only person who instructed him on how to perform his work (*id*. at 38). His unrebutted testimony also indicates that the coworker he asked about the hose was not paying attention. It therefore cannot be said that there is an issue of fact as to whether Plaintiff ignored a direct instruction not to move the jack, as Plaintiff only points to a vague statement from a distracted coworker and not an order from his supervisor (*cf. Hernandez v 151 Sullivan Tenant Corp.*, 307 AD2d 207 [1st Dept 2003] ["Inasmuch as defendant points to no immediate instruction to avoid an unsafe practice that plaintiff disobeyed, its attempt to portray him as a recalcitrant worker fails"]).

Defendants' remaining contentions, that Plaintiff was a recalcitrant worker or that he had previously complained about unsecured beams, must also fail. First, the record is undisputed as to the lack of any safety device and as such there is no issue of fact as to whether Plaintiff was recalcitrant for failing to use one. Second, Plaintiff did not testify about having complained about unsecured beams. Rather, he testified that the beams being used were too short and that Palawachi had told him that the beams were going to be nailed in at the edge (Plaintiff EBT at 64-65). Plaintiff's uncontroverted testimony indicates that he was working under the assumption that somebody else had secured the beams before he went around measuring the jacks. The Court accordingly grants the branch of the motion seeking summary judgment on Plaintiff's Labor Law § 240(1) cause of action.

Plaintiff next seeks summary judgment on his Labor Law § 241(6) cause of action due to Defendants' purported violation of Industrial Code § 23-1.7(a)(1). Labor Law § 241(6) "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection to persons employed in . . . all areas in which construction, excavation or demolition work is being performed" (*Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]). To establish a defendant's liability under Section 241(6), "a plaintiff must show that a specific, applicable Industrial Code regulation was violated and that the violation caused the complained-of injury" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 146 [1st Dept 2012], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

12 NYCRR § 23-1.7(a)(1) mandates protection from overhead hazards in certain circumstances: "[e]very place where persons are required to work or pass that is exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead

protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength." Plaintiff contends that this rule was violated due to the lack of any overhead protection. Defendants argue that the area in which Plaintiff was working was not normally exposed to falling objects and that this rule therefore does not apply.

The Court finds that there is a triable issue of fact with respect to whether the area in which Plaintiff was working was "normally exposed to falling material or objects" within the ambit of 12 NYCRR § 23-1.7(a)(1). Plaintiff testified that he was unaware of beams or other objects falling in the area:

> Q: Are you aware of any other beams falling in the area of where your accident occurred?
> A: No. I'm not sure. I mean I'm not sure. Once I fell I was just looking up.
> Q: I'm talking about prior to your accident. Are you aware of any other instances of beams falling?
> A: No.
> Q: Any other materials other than beams that you're aware of falling in the area of your accident?
> A: No.

(Plaintiff EBT at 67). Rinaldi's senior project manager testified that there was no "fall protection" or device underneath the beams to stop them from falling all the way to the ground (NYSCEF Doc. No. 65, Frawley EBT at 89). As there is a question of fact as to whether the area in which Plaintiff was working was normally exposed to falling objects, summary judgment on his Labor Law § 241(6) cause of action is denied (*see, e.g., Garcia v SMJ 210 W. 18 LLC*, 178 AD3d 473 [1st Dept 2019]).

Accordingly, it is hereby:

ORDERED that the branch of Plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action is granted as against Defendants; and it is further

ORDERED that the branch of Plaintiff's motion for summary judgment on his Labor Law § 241(6) cause of action is denied.

12/8/2023
DATE

LORI S. SATTLER, 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