SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** **PART** **12**

Justice

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HECTOR HERNANDEZ,

Plaintiff,

- v -

HARLEM PARK ASSOC. LLC,

Defendant.

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INDEX NO. 151485/2020

MOTION DATE 10/17/2023, 10/17/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 66

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 59, 63, 64

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

This action arises out of injuries allegedly sustained at a construction site where Hector Hernandez (plaintiff) was demolishing the first floor of 160 West 124th Street, New York, New York (the premises). The premises is owned by defendant Harlem Park Assoc. LLC. (Harlem Park).

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim (motion sequence 001). Harlem Park opposes and separately moves to dismiss plaintiff's claims pursuant to Labor Law § 200 and common law negligence (motion sequence 002).

I. Alleged Facts

Harlem Park hired non-party AGL as the general contractor for the construction work at the premises. AGL employed plaintiff as a demolition worker on the date of the accident, January 24, 2020. On that date, plaintiff was working near a hole in the floor. The hole was about six feet

wide and between 20- 23 feet long, and twelve-inch-wide beams ran parallel to each side of the hole and across the opening.

Without a safety harness, plaintiff walked across the middle beam to obtain caution tape for the hole. Plaintiff lost his balance and fell from the beam, falling into the concrete basement floor below. A six-by-six piece of wood fell along with him, striking him on the left wrist as upon landing on the floor. As a result of the fall, plaintiff alleges that he suffered a fracture of the left wrist, lumbar disc herniations and bulges, and a right should rotator cuff tear.

I. Analysis

It is well-established principle the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The party opposing a motion for summary judgment "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form." *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

A. Plaintiff's Motion for Summary Judgment

i. Statement of Undisputed Material Facts

At the outset, Harlem Park argues that as plaintiff failed to submit a separate statement of undisputed material facts, his motion should be denied as procedurally defective pursuant to 22 NYSCRR § 202.8-g (a). However, the absence of a separate statement of undisputed material facts

is not fatal to a motion for summary judgment. Pursuant to 22 NYCRR § 202.8-g (a), the Court is afforded with discretion as to whether such statement is required.[1] Further, the factual recitation in plaintiff's attorney affirmation functionally serves as a statement of undisputed material facts, and plaintiff submits a separate statement of undisputed material facts with his reply papers.

As plaintiff cures his omission and minimizes any resulting prejudice, the Court declines to deny the motion on the procedural basis of plaintiff's failure to include a statement of undisputed material facts, especially given the strong public policy to resolve matters on their merits. *See* 22 NYCRR § 202.8-g (e).

ii. Labor Law § 240 (1)

Labor Law § 240 (1) states in pertinent part:

> 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.

The statute imposes absolute liability upon owners, contractors, and their agents where a breach of this statutory duty proximately causes an injury. *See Gordon v Eastern Railway Supply, Inc.*, 82 NY2d 555, 559 (1993); *Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, 500 (1993); *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991). "The purpose of this statute is to protect workers and to impose the responsibility for safety practices on those best situated to bear that responsibility." *See Ross*, 81 NY2d at 500.

Plaintiff argues that he is entitled to summary judgment pursuant to Labor Law § 240 (1) because he was caused to fall from a height as a result of the absence of adequate safety equipment.

[1] "Upon any motion for summary judgment...the court *may* direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." 22 NYCRR § 202.8-g (a) (emphasis added).

Plaintiff testified at his deposition that there was no other way to reach the caution tape than traversing the beam from which he fell, as the ground surrounding the hole was either littered with material and debris or did not have ground upon which plaintiff could step. As a result, he had no choice but to traverse the beam without the benefit of a harness or safety line to break his fall. Plaintiff further testified that defendants failed to provide proper protection to him. Defendants do not dispute that they did not provide safety devices, only that such safety devices were unnecessary as plaintiff should have taken an alternate route.

In opposition, Harlem Park contends that despite having other paths away from the hole, plaintiff voluntarily elected to walk across the open hole on a narrow beam. As such, Harlem Park maintains that plaintiff is the sole proximate cause of his injuries, as he could have walked around the hole but chose not to, despite his extensive safety training. However, Harlem Park cites to no evidence in support of its position. Rather, Harlem Park relies on its attorney's affirmation for the proposition that alternative routes were available to plaintiff.

Plaintiff tenders sufficient evidence to show that he suffered injuries when he slipped and fell from a beam which he traversed without the benefit of any safety devices sufficient to protect him from the elevation-related hazards of his job. In opposition, defendants fail to offer any evidence to rebut plaintiff's sworn deposition testimony that he had no alternate routes around the hole. Rather, Harlem Park submits the affirmation of its attorney, who lacks personal knowledge of the facts, and which does not have the requisite probative value to defeat plaintiff's motion for summary judgment. *See Russo v 491 W. St. Corp.*, 176 AD2d 672, 673 (1st Dept 1991) ("the affirmation of an attorney who lacks personal knowledge of the facts usually does not have the probative value to defeat a motion for summary judgment").

Construing Labor Law § 240 (1) liberally (*see Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 292 [2003]), as required, plaintiff is entitled to judgment as a matter of law on his Labor Law § 240 (1) claim, and his motion for summary judgment is granted.

B. Harlem Park's Motion for Summary Judgment

An owner or general contractor will not be found liable under common law Labor Law § 200 where it has no notice of any dangerous condition which may have caused the plaintiff's injuries nor the ability to control the activity which caused the dangerous condition. *See Filarakos v St. John the Baptist Greek Orthodox Church*, 169 AD3d 489, 490 (1st Dept 2019); *Chowdhury v Rodriguez*, 57 AD3d 121, 128 (2d Dept 2008).

Harlem Park argues that, as plaintiff testified at his deposition that he received his job instructions from his supervisor with his non-party employer ADL, Harlem Park cannot be held liable for common law negligence because they did not supervise, direct, or control plaintiff's work. Defendants also emphasize that plaintiff confirmed that no one from Harlem Park directed him as to where or how to work at the job site. Plaintiff does not oppose the motion.[2]

Therefore, through plaintiff's deposition testimony, Harlem Park eliminates all material issue of fact with respect to plaintiff's Labor Law § 200 claim against it, and in addition to not opposing Harlem Park's motion, plaintiff fails to submit evidentiary proof in admissible form to raise material questions of fact. Therefore, Harlem Park's motion seeking summary judgment dismissing plaintiff's Labor Law § 200 claim is granted.

[2] In his "Affirmation in Response," plaintiff confirms that he takes no position with respect to Harlem Park's motion, refers the Court to his position on Labor Law § 240 (1) in motion seq. 001, and notes that neither Harlem Park nor Plaintiff addresses plaintiffs Labor Law § 241 (6) claims via motion practice.

II. Conclusion

Accordingly, it is

ORDERED that the motion of plaintiff Hector Hernandez for summary judgment on his Labor Law § 240 (1) claim is granted, with damages to be determined at the time of trial; and it is further

ORDERED that the motion of defendant Harlem Park Assoc. LLC. for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted, and such claim is severed and dismissed.

The foregoing constitutes the decision and order of the Court.

LESLIE A. STROTH, J.S.C.

1/11/2023
DATE

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