SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **49M**

Justice

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ZGLINSKI, ANDREW

Plaintiff,

- v -

AMSTERDAM AVENUE, et. al.

Defendants.

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INDEX NO. 154687/2017

MOTION DATE 02/16/2023, 02/17/2023

MOTION SEQ. NO. (MS) 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 143, 145

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 140, 141, 142, 144, 146

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

Plaintiff Andrew Zglinsky sustained personal injuries on September 8, 2018, while working in a construction and renovation project in defendants' building located at 200 Amsterdam Avenue in the state, city, and county of New York. Plaintiff filed a complaint against defendants alleging violations of Labor Law §§ 200, 240 (1), and 241 (6). In Motion Sequence (MS) 003, plaintiff seeks partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims, which defendants oppose (MS 003). In MS 004, defendants move for summary judgment dismissing plaintiff's Labor Law §§ 200 and 241(6) and common law negligence claims; plaintiff does not oppose defendants' motion but notes that defendants' motion failed to address the Industrial Code on which his Labor Law § 241(6) is predicated.

FACTS

Amsterdam Avenue Redevelopment Associates LLC and Mitsui Fudosan America, Inc. (defendants) own the building at 200 Amsterdam Avenue. Defendants engaged contractors for their project, which was to demolish the synagogue that was on the premises so to construct a new building (MS 003 - NYSCEF # 85, Rule 202.8-g Stmt ¶¶ 3-4). Non-party PAL Environmental Services (PAL) was contracted to remove asbestos from the interior of the building, which required demolishing the

walls and the ceiling (*id.* ¶ 5). PAL hired plaintiff as a worker (NYSCEF # 113 ¶ 10). On September 8, 2018, in line with his assigned duty, plaintiff was removing asbestos from the ceiling of the basement in preparation for demolition of the building (NYSCEF # 96, pltf's tr at 56-63). He was performing this work from a baker scaffold when he fell off the platform (*id.* at 81-82, 131-134). Plaintiff testified that he received all his work instructions from either PAL's supervisor, Jack/Jacea Filipowicz, or co-worker Myroslav Mazurkevych (*id.* at 79-80). Filipowicz testified that he had instructed plaintiff on safety devices such as harnesses when plaintiff worked in the exterior part of the construction site; the exterior scaffolds were much higher than the interior ones (NYSCEF # 101, Filipowicz tr at 52-53).

It was Mazurkevych who assigned plaintiff his task and told him to climb the baker scaffold on the day of the accident (NYSCEF # 96, pltf's tr at 89:16-19). Plaintiff's specific duties at the time of the accident involved cleaning the beams and ceilings after the asbestos removal; he cleaned as fast as he could because it was his last day on the job (*id.* at 80-83).

Plaintiff recalls that just prior to his accident, as he bent over and took a step to gain a better reach of the ceiling, he fell from the baker scaffold and landed on the concrete floor of the basement. Plaintiff stated that he landed feet first and then on his back as he hit the concrete (*id.* at 131-134). When he attempted to stand up after the fall, he was unable to do so due to a fracture in his foot. Plaintiff testified at his deposition that there were no safety rails on the scaffold (*id.* at 108). And when shown two photographs of the scaffold, plaintiff testified that while the scaffold in the photos looked like the one he used, there was a difference in that the scaffolds in the photos had a safety bar or metal cross bracing, which was not placed in the scaffold he used (*id.* at 107-108). Plaintiff also testified that the scaffold did not have a harness, nor did he ask for one since his supervisor, [Filipowicz] told him "it was not high enough to use the harnesses" (*id.* at 109).

Richardo Blake, PAL's Director of Health and Safety, testified that plaintiff was supervised and given instructions by PAL supervisors or his co-workers, not by defendants. And the scaffolds on the site were provided exclusively by PAL, including the scaffold with railings that plaintiff used at the time of the accident (NYSCEF # 119, Blake tr at 9:14-19; 24:9-25; 8). Blake took photos of a scaffold after plaintiff's accident.

DISCUSSION

Both plaintiff and defendants each seek summary judgment on various claims. A movant for summary judgment must show that there is no genuine dispute as to any material facts and that the movant is entitled to judgment as a matter of law. Once this showing is made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form, which is sufficient to

establish the existence of a material issue of fact (*Mazurek v Metro. Museum of Art,* 27 AD3d 227, 228 [1st Dept 2006]). Only if, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists will summary judgment be denied (*Vega v Restani Construction. Corp.*, 18 NY3d 499, 503 [2012]). If there is any doubt as to the existence of a triable issue, the motion should be denied (*Grossman v Amalgamated House Corp.,* 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240 (1)

Plaintiff moves for summary judgment on his Labor Law § 240 (1) claim on the basis that it is undisputed that he fell off the scaffold while he was cleaning the ceiling after the asbestos removal (NYSCEF # 86, pltif's mol at 4). Defendants oppose arguing that they are not liable because plaintiff was the sole proximate cause of his accident (NYSCEF # 124, defts' aff in opp ¶31). Defendants also claim that the photographs in evidence contradict plaintiff's assertion that the scaffold had no railings (*id.* ¶ 37; NYSCEF # 138, photos). Finally, defendants point out that plaintiff was the only witness to his own accident, and the record presents two versions of the accident (NYSCEF # 124, defts' aff in opp ¶ 35).

Labor Law § 240 [1] provides that "[a]ll contractors and owners and their agents, . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish . . . scaffolding . . . [and such devices] to give proper protection to a person so employed" (Labor Law § 240 [1]). To establish a cause of action under Labor Law § 240, a plaintiff must show that the statute was violated and the violation was a proximate cause of the worker's injury (*Tounkara v Fernicola*, 80 AD3d 470 [1st Dept 2011] ["Plaintiff made a prima facie showing of defendants' liability under § 240 [1] by asserting that defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of the accident"]; *see also Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280 [2003]).

To raise the sole proximate cause defense, defendants must show that "adequate safety devices [were] available; that [plaintiff] knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [1st Dept 2011] citing *Gallagher v New York Post*, 14 NY3d 83, 88 [2010] and *Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 40 [2004]). Here, the question of whether the adequate safety devices were provided must be addressed before considering whether plaintiff was the sole proximate cause of his accident (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009] ["in determining whether there is a violation of Labor Law § 240 [1], or whether a worker is the sole proximate cause of

his injuries, the issue to be addressed first is whether adequate safety devices were provided . . . for the worker's use"]).

To this question, plaintiff claims that the scaffold did not have safety rails. Defendants claim that the photograph in evidence shows the scaffold at issue and there were rails on the scaffold. However, it is undisputed that the scaffold was missing a mid-level safety rail when the plaintiff fell. This was expressly admitted by witnesses Blake and Filipowicz at their depositions (NYSCEF #100, Blake tr at 86:2-6, 87:4-9; 90:19-91:14; 91:23-92:5; NYSCEF #101, Filipowicz tr at 102:25-103:7). This is also shown in the photos of the scaffold, which reveals the absence of a mid-level safety rail and the significant gap between the plaintiff and the single railing that allowed the plaintiff to fall (*see* NYSCEF #s 98, 122).

As to defendants' claim that plaintiff was provided with a harness but chose not to use it, defendants provide nothing to support their claim. Defendants merely refer to "(**Exhibit "K"** at pg.74.)" (NYSCEF # 125, defts' aff in opp ¶ 24 [emphasis in original]). Exhibit K is Filipowicz's deposition transcript and page 74 pertains to whether the scaffolds had wheels in the photos of a scaffold. There is no mention about plaintiff being provided with a harness but declining to use it (NYSCEF # 136, Filipowicz tr at 74). However, there was testimony by Filipowicz that he never had safety discussions with plaintiff about working in the interior of the building (*id.* at 52). Based on this evidence, defendants have not contradicted plaintiff's claim that the scaffold had no harness or that he would have received one had he asked for one since he was not working from a height that would warrant the use of a harness.

Defendants argue that because plaintiff was the only witness to his accident, and there are issues of fact as to how plaintiff's accident occurred, summary judgment cannot be granted in plaintiff's favor.

The mere fact that plaintiff was the sole witness of the accident does not preclude summary judgment in his favor (*see Melchor v Singh*, 90 AD3d 866, 869 [2d Dept 2011]; *see also Cardenas v. 111-127 Cabrini Accident Apartments Corp.*, 145 AD3d 955, 957 [2d Dept 2016]). When a plaintiff is the sole witness to the accident, summary judgment is only appropriate if the defendant has presented no evidence of a triable issue of fact relating to plaintiff's credibility or materially different versions of how the accident occurred (*Klein v City of New York*, 89 NY2d 833, 835 [1996]). A defendant is required to proffer evidence contradicting the plaintiff's version of the accident; this, defendants fail to do.

Defendants assert that "Filipowicz testified that he was made aware that [p]laintiff's accident did not occur because he stepped off the scaffold platform, but rather, because he fell from the scaffold ladder. (**Exhibit "F"** at pgs. 100-102, 119-120.)" (Defts' aff in opp ¶ 25 [emphasis in original]). Exhibit F is plaintiff's

deposition transcript (NYSCEF # 131, pltf's tr dated Oct. 22, 2019). In any event, in reviewing Filipowicz's transcript in defendants' exhibit K at pages 100-102 and 119-120, Filipowicz testified that plaintiff told him that plaintiff fell from a ladder but did not show Filipowicz the ladder. "[Filipowicz] asked him to go inside to show [Filipowicz the ladder,] [b]ut [plaintiff] did not want to go (NYSCEF # 136, Filipowicz tr at 120:2-13). Plaintiff testified that he could not walk after his fall and was brought outside by two co-workers (NYSCEF # 131, pltf's tr at 145). There were no questions to plaintiff on Filipowicz's request to be shown the ladder, and defendant presents no further testimony about the ladder from Filipowicz.

Except for Filipowicz's limited testimony, defendants show no other evidence that would indicate plaintiff's fall was from a ladder. In contrast to the scaffold, there were no photos depicting a ladder and no other testimony or documents pointing to a ladder being involved in the accident. To agree with the defendants' argument will be tantamount to accepting conclusory assertions offered without any evidentiary support and do not establish a genuine issue for trial. As such, plaintiff's motion for summary judgment on his Labor Law § 240 (1) is granted.

Labor Law § 241 (6)

Both plaintiff and defendants move for summary judgment on Labor Law Section 241 (6). Plaintiff predicates his Labor Law § 241 (6) on Industrial Code § 23-5.18 (b) and (c) regarding safety rails on scaffolds and access to scaffold platforms, respectively, which plaintiff claims defendants violated (MS003). Defendants, in turn, argues that the record shows that the scaffold had a safety rail and there were ladders available for plaintiff's use, but that plaintiff opted to climb the side of the scaffold instead, that would make him the sole proximate cause of his accident (NYSCEF # 124, defts' aff in opp at 46, 48).

Industrial Code § 23-5.18 (b) requires safety railings on "[t]he platform of every manually propelled mobile scaffold" (12 NYCRR § 23-5.18). As discussed in the above Labor Law § 240 (1) section, the subject scaffold was not adequately equipped with safety rails. Thus, plaintiff's motion for summary judgment on his Labor Law § 241(6) predicated on Industrial Code § 23-5.18 (b) is granted. As for plaintiff's claim under Industrial Code § 23-5.18 (c) regarding ladders, the claim is dismissed as academic based on the findings above on the ladder issue.

Turning to defendant's motion for summary judgment (MS 004) on Labor Law § 241 (6) predicated on Industrial Code sections 23-1.5(a), 23-1.5(b), 1.5(e), 23-1.8(c), 23-1.16(a), (b), (c), (e), and (f), 23-5.4, 23-5.5, 23-5.9, 23-5.13, 23-5.14, 23-5.16, and 23-5.17, and plaintiff's claim based on alleged OSHA regulations, it is granted as plaintiff does not contest defendants' challenge on his claim Notably, defendants' motion omits Industrial Code § 23-5.18 (b) and (c) that were in plaintiff's motion for partial summary judgment (MS 003) to which defendants unsuccessfully opposed.

Labor Law § 200

Defendants seek summary judgment on plaintiff's claim under Labor Law § 200 (MS 004), which "is a codification of the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]). Plaintiff raises no objection to this branch of defendants' motion. Thus, defendants' motion to dismiss plaintiff Labor Law § 200 and common law neglisence is granted.

Accordingly, based on the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment pursuant to Labor Law § 240 (1), and Labor Law § 241 (6) predicated on Industrial Code § 23-5.18 (b) are granted; and it is further

ORDERED that defendants' motion for summary judgment (MS 004) dismissing plaintiff's claims pursuant to Labor Law § 200 and common law negligence, and Labor Law § 241(6) predicated on the Industrial Code sections as listed in defendants' motion sequence 004 and as listed above on page 6 of this order, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment as written.

1/11/2024
DATE

MARGARET A. CHAN, J.S.C.

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