SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

KLIPPER VIVANCO JARAMILLO,

Plaintiff,

- v -

VS 125 LLC, PLAZA CONSTRUCTION LLC, TIME SQUARE CONSTRUCTION INC., and PLAZA/TIME SQUARE JOINT VENTURE,

Defendants.

----------X

INDEX NO. 157590/2018

MOTION DATE 11/30/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, and 79

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

In this action brought to recover for injuries sustained on a construction site pursuant to the Labor Law, plaintiff moves for partial summary judgment on the fifth cause of action for violation of Labor Law § 240(1). Upon the foregoing documents, the motion is granted, in accordance with the following memorandum decision.

Background

At the time of the accident giving rise to this action, plaintiff was working on the construction of a new building located at 125 Greenwich Street, New York, New York, owned by defendant VS 125 LLC ("VS") (Chiodo EBT tr, NYSCEF Doc. No. 49 at 15, 17). Defendant Plaza/Time Square Joint Venture ("Plaza/Time"), a joint venture of defendant Plaza Construction LLC and Time Square Construction Inc., served as general contractor for the project (*id.* at 23).

Plaintiff was employed by non-party Structure Tech NY ("STNY"), a subcontractor hired by Plaza/Time (*id.* at 33; plaintiff's December 11, 2019 EBT tr, NYSCEF Doc. No. 47 at 27).

On July 23, 2018, plaintiff was working on the 50th or 51st floor of the building (plaintiff's December 11, 2019, EBT tr, NYSCEF Doc. No. 47 at 42-43). There is a factual dispute as to what plaintiff was doing at the time of the accident. STNY employees were engaged in removing forms used for the pouring of concrete (*id.* at 39-50). The form in question was approximately 1 and a half feet wide and eight to ten feet long (*id.* at 55). Such forms are removed by one worker with a crowbar while two other workers hold a rope affixed to the form (Garcia EBT tr., NYSCEF Doc. No. 51 at 42-43). The end of the rope not being held by the workers is tied around a pole hanging from the ceiling (*id.* at 48).

Plaintiff testified that he was bent over picking clamps up off the floor, approximately 3-4 feet away from the wall, and about 12-14 feet below a form that was attached to the poured concrete wall (plaintiff's December 11, 2019 EBT tr, NYSCEF Doc. No. 47 at 51-52). While doing so, he heard his coworker Pedro Pilamunga yell at him (*id.* at 59-60). He looked up, and saw the form falling towards him, put up his right hand, was struck in the hand, and thrown backwards (*id.* at 60-61). Pilamunga testified at his deposition that the post holding the other end of the rope was not properly secured, and that a foreman pulling on the rope caused the form to fall (Pilamunga EBT tr., NYSCEF Doc. No. 50 at 52, 61). He also testified, however, that plaintiff was helping him remove the form rather than picking up clamps (*id.* at 58-59), and that plaintiff was not thrown off of his feet (*id.* at 65-69). Plaintiff's testimony as to what he was doing prior to being hit by the falling form is also contradicted by the STNY accident report, which records plaintiff's statement that he was helping to remove the form (accident report,

NYSCEF Doc. No. 54). Ultimately, plaintiff claims injuries to his right hand and fingers, both knees, his right ear, and his lumbar and cervical spine, requiring surgery.

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

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) 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" (*Ross v Curtis-Palmer Hydro-Elec. Co*., 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and 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]).

Not every worker who falls or is struck by a falling object 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]). 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 show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

In a "falling object" case such as this, "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]). Here, plaintiff has established prima facie entitlement to summary judgment as to liability on his claim under Labor Law § 240(1). The safety devices

provided to secure the form as it was being removed from the wall, namely the rope and ceiling post, were inadequate to prevent the form from falling and striking plaintiff. The failure to adequately secure the form from falling is a violation of Section 240(1) (*Naughton v City of N.Y.*, 94 AD3d 1, 8 [1st Dept 2012] ["Labor Law § 240 (1) applies where a plaintiff is struck by a falling object that was improperly hoisted or inadequately secured"]). Defendants' argument that plaintiff was the sole proximate cause of the accident is wholly speculative and legally insufficient (*Collins v W. 13th St. Owners Corp.*, 63 AD3d 621, 622 [1st Dept 2009] ["In order for a plaintiff to be considered the sole proximate cause of his injuries, it must be shown that an appropriate safety device was available, but that plaintiff chose not to use the device"]). There is no indication in the record that plaintiff, to the extent he was involved in removing the form, chose not to use an appropriate safety device.

Defendants point to various inconsistencies in the record regarding what plaintiff was doing before he was struck by the form, whether he reported the accident to his foreman, and the existence of a prior injury to and disability of his right hand. These inconsistencies are insufficient to raise a material issue of fact requiring trial. There is no meaningful, non-speculative dispute in the record that plaintiff was struck by an inadequately secured falling object. "A lack of certainty as to exactly what preceded plaintiff's [accident] does not create a material issue of fact here as to proximate cause" (*Verqara v. SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]). While plaintiff's credibility may be strained by the inconsistencies regarding other matters in the record, there is no issue of fact where the "inconsistencies . . . are not material to the issue of how the accident occurred" (*Bradley v Ibex Constr., LLC*, 54 AD3d 626, 627 [1st Dept 2008]). In this regard, the court notes that, contrary to defendants' reading of his testimony, Pilamunga, who witnessed the accident, consistently stated that something about

the post was not properly secured, even if he did not know the exact reason why the form fell (Pilamunga EBT tr., NYSCEF Doc. No. 50 at 52, 61, 63-64). To the extent that defendants' counsel offers conjecture in the opposition memorandum of law as to whether the sequence of events described by plaintiff is physically possible, "[a]s counsel has no firsthand knowledge of the events, the [memorandum] is lacking in any probative value," and improperly offers speculation and conjecture in opposition to the motion (*Kreis v Kiyonaga*, 200 AD3d 1144, 1146 [3d Dept 2021]; *see also Lupinsky v Windham Const. Corp.*, 293 AD2d 317, 318 [1st Dept 2002] ["an attorney's affidavit is accorded no probative value unless accompanied by documentary evidence that constitutes admissible proof"]). The court notes that no expert affidavit or other admissible evidence as to the calculation of the distance covered by a falling object, which calculation is central to counsel's unsupported skepticism, is present in the record.

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants on the fifth cause of action as follows; and it is further

ORDERED that the defendants are found liable to plaintiff on the fifth cause of action and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that this matter is respectfully referred to the Clerk of the Trial Assignment Part to be scheduled for trial.

This constitutes the decision and order of the court.

ENTER:

1/18/2024
DATE

LOUIS L. NOCK, 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