At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 3rd day of September, 2024

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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WIESLAW TRONT,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, and THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY,

Defendants,

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Index No.: 524053/2019
Decision and Order
Mot. Seq. No. 2 & 5

The following *papers NYSCEF* Doc #'s 53 to 143 read on this motion:

Papers	*NYSCEF DOC NO.'s*
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed	53-60; 116-139
Opposing Affidavits (Affirmations)	85-90; 142
Reply Affidavits	113; 143

After having come before the Court on JANUARY 24, 2024 and the Court having heard oral argument and upon of review of the foregoing papers the court finds as follows:

Plaintiff moves for summary judgment pursuant to CPLR 3212 (MS#2). Defenants oppose the same. Defendants also move for an order; (1) vacating the Decision and Order of Justice Richard Velasquez dated September 20, 2023; (2) restoring the defendants' motion to reargue and placing it back on the active calendar

for Justice Richard Velasquez and hearing the motion on the merits; (3) upon reargument, granting the defendants' motion to re-argue the Decision and Order of Justice Knipel dated on or about May 10, 2023 and upon reargument denying the plaintiff's previous motion to re-argue the Decision and Order of Justice Freier dated February 23, 2023 and reinstating the Decision and Order of Justice Freier dated February 23, 2023; (4) compelling the plaintiff to appear for all designated independent medical examinations in this action. (MS#5).

The alleged incident arose from a construction accident that occurred on May 24, 2019, at P.S. 48 located at 6015 18th Avenue, Brooklyn, New York. It is undisputed that on May 24, 2019, CITY was the owner of the premises. On May 24, 2019, SCA was the construction manager of the Project. SCA hired RICI as the general contractor. On May 24, 2019, Plaintiff was working as a mason employed by RICI performing work removing old paint off a wall in room 501. It is undisputed that Plaintiff set up a six (6) foot A-frame ladder next to the wall he was required to work on. Plaintiff states the ladder was properly set up and the braces of the ladder were fully extended. Plaintiff then got onto the ladder and was on the third rung of the ladder scraping the old paint off the wall with a spackle he was holding in his right hand and holding onto the top of the ladder with his left hand. NYSCEF DOC No. 58, p. 37; NYSCEF Doc No. 59, p. 55; NYSCEF Doc No 56. ¶¶ 5-6. As plaintiff was working the ladder wobbled and shifted to the left causing Plaintiff and the ladder to fall to the floor. NYSCEF Doc No 56. ¶ 7; NYSCEF Doc No 58., pp. 38-39, 41, 48. It is undisputed that the A frame ladder plaintiff used was the only ladder available to Plaintiff on the date of his accident there were no other ladders in or near his work area. NYSCEF Doc No 56. ¶ 8. Plaintiff alleges his

supervisor told him that the baker scaffold was exclusively only for when he was working on the ceiling. NYSCEF Doc No 56. ¶ 11; NYSCEF Doc No. 58, p. 43. 26. In addition it is alleged, that on the date of the accident, plaintiff was told he should use the ladder for the walls because it is faster and easier and time was of the essence. NYSCEF Doc No 56 ¶ 11; NYSCEF Doc No 58, pp. 45-46. It is undisputed that Plaintiff was not instructed to use nor was plaintiff provided any safety devices or equipment to secure the ladder in place. NYSCEF Doc No 56 ¶ 10.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR 3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v. Zeh*, 45 Misc2d 93 [Sup Ct, Albany County], aff'd 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v. Garfield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2nd 557 [1990]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v.Algaze*, 84 NY2d 1019 [1995]).

Labor Law § 240(1)

Labor Law 240(1) provides:

> "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."

Defendant contends that Plaintiff's cause of action as to violations of Labor Law

240(1) should be dismissed because the plaintiff was the sole proximate cause of his accident. Defendant further contends that when plaintiff is only witness to the accident summary judgment cannot be granted as plaintiff credibility is in question.

"Liability under Labor Law 240(1) depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against". (*Salazar v. Novalex Contracting Corp.*, 18 NY3d 134, at 139, 960 NE2d 393, 936 NYS2d 624 [Ct. of App. 2011].) " Labor Law 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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.*" (*Runner v. New York Stock Exchange*, 13 NY3d 599, at 604, 922 NE2d 865, 895 NYS2d 279 [2009] [quoting *Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494, at 501, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993)].) In determining the applicability of the statute, the "relevant inquiry" is "whether the harm flows directly from the application of the force of gravity to the object." (*See Runner v. New York Stock Exchange*, 13 NY3d at 604.) "The dispositive inquiry ... does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker." (*id* at 603.) "Rather, 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." (*Id.*)

"The purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the

statute unless the injury producing accident is attributable to the latter sort of risk." (*See Runner v. New York Stock Exchange,* 13 NY3d at 603). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Berg v. Albany Ladder Co.*, 10 N.Y.3d 902, 904, 861 NYS2d 607, 891 NE2d 723; *Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280, 287, 771 NYS2d 484, 803 NE2d 757; *Martinez v. Ashley Apts Co., LLC,* 80 AD3d 734, 735, 915 NYS2d 620). "[W]here a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" (*Cahill v. Triborough Bridge & Tunnel Auth.,* 4 NY3d 35, 39, 790 NYS2d 74, 823 NE2d 439; *see Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d at 290, 771 NYS2d 484, 803 NE2d 757).

In the present case, it is undisputed that the injury is the result of an elevated risk as the plaintiff fell from an unsecured ladder. There is no dispute that the ladder was unsecured. Defendant contends the mere fact that a plaintiff fell from a ladder does not, in and of itself, establish a violation of the statute. However, a plaintiff may establish prima facie entitlement to judgment as a matter of law by showing both that he or she fell from a defective or unsecured ladder, and that the defect or failure to secure the ladder was a proximate cause of his or her injuries (*see Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096, 1097 [2012]). Where a plaintiff is the sole witness to the accident and his or her credibility has been placed in issue, the granting of summary judgment on the issue of liability in favor of the plaintiff on a Labor Law § 240 (1) cause of action is inappropriate (*see Woszczyna v BJW Assoc.*, 31 AD3d 754, at 755, 820 NYS2d 289 [2d Dept. 2006]).

The case law in the Second Department is clear that a plaintiff who falls from an unsecured ladder that tips over, moves or slips out from underneath him while engaged in an activity covered under Labor Law §240(1) has established a prima facie entitlement to summary judgment as a matter of law under the statute. See *Casasola v. State of New York*, 129 AD3d 758, 9 NYS3d 685, (2d Dept. 2015); *Seferovic v. Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 7 NYS3d 458, (2d Dept. 2015); *Grant v. City of New York*, 109 AD3d 961, 972 NYS2d 86, 297 Ed. Law Rep. 399 (2d Dept. 2013); *Canas v. Harbour at Blue PointHome Owners Assoc., Inc.*, 99 AD3d 962, 953 NYS2d 150, (2d Dept. 2012); *Hossain v. Kurzynowski*, 92 AD3d 722, 939 NYS2d 89 (2d Dept. 2012); *Kaminski v. 22-61 42nd St., LLC*, 91 AD3d 606, 935 NYS2d 903 (2d Dept. 2012); *Gonzalez v. AMCC Corp.*, 88 AD3d 945, 931 NYS2d 415, (2d Dept. 2011); *Ordonez v. C.G. Plumbing Supply Corp.*, 83 AD3d 1021, 922 NYS2d 156 (2d Dept. 2011); *Yin Min Zhu v. Triple L. Group, LLC*, 64 AD3d 590, 881 NYS2d 324 (2d Dept. 2009); *Mingo v. Lebedowicz*, 57 AD3d 491, 869 NYS2d 163 (2d Dept. 2008); *Rivera v. Dafna Constr. Co., Ltd.*, 27 AD3d 545, 813 NYS2d 109, (2d Dept. 2006). Here, it is undisputed that Plaintiff fell from an unsecured ladder that tipped over while engaged in an activity covered under Labor Law §240.

It is equally well settled that the failure to adequately secure a ladder, to ensure that it continues to support the plaintiff while in use, constitutes a violation of Labor Law §240(1). *Melchor v. Singh*, 90 AD3d 866, 935 NYS2d 106 (2d Dept. 2011); *Peralta v. AT&T Co.*, 29 AD3d 493, 816 NYS2d 436 (1st Dept. 2006); *Montalvo v. J. Petrocelli Construction, Inc.*, 8 AD3d 173, 780 NYS2d 558 (1st Dept. 2004). Defendants contend that Plaintiff's accident was unwitnessed and that this somehow creates an issue of

credibility without pointing to any testimony or other evidence that disputes Plaintiff's account of how the accident occurred. Nor do Defendants note any inconsistencies in Plaintiff's testimony regarding the happening of the accident. In the present case, at no point has Plaintiff's credibility been placed in issue. Therefore, defendants reliance on *see Woszczyna v BJW Assoc.*, 31 AD3d 754, 820 NYS2d 289 [2d Dept. 2006] is of no moment, as that case is distinguishable, in that the plaintiffs credibility was brought into question, unlike the present case, where the plaintiffs credibility has not been brought into question.

Countless cases from the Appellate Division, Second Department, have held that a situation involving a worker falling from an unsecured ladder that moved, shifted or toppled over, such as what occurred to Plaintiff here entitles him to summary judgment based on a violation of Labor Law §240(1). *See Ordonez v. C.G. Plumbing Supply Corp.*, 83 AD3d 1021 (2d Dept. 2011), wherein the plaintiff was injured when an unsecured extension ladder slipped from underneath him while he was attempting to descend it after completing a welding task. A coworker had placed the ladder against the building wall and the plaintiff stood on it while he welded. After finishing, he took a step down and the ladder slipped out away from the wall, causing the plaintiff to fall to the ground and sustain injuries. The Appellate Division, Second Department, found the plaintiff was entitled to summary judgment as a result of defendant's violation of Labor Law §240(1) as the unsecured ladder upon which the plaintiff was standing tipped over, causing him to fall and sustain injuries. In another example, *Gonzalez v. AMCC Corp.*, 88 AD3d 945, 931 NYS2d 415 (2d Dept. 2011), the plaintiff was standing on an unsecured A frame ladder, when the ladder shifted, causing the plaintiff

to fall to the ground there were no safety devices provided. The court found a violation of the statute existed.

Accordingly, plaintiff motion for summary judgment is hereby granted, for the reasons stated above. (MS#2). MS# 5 is granted to the extent that the first request for relief is granted. The clerk shall restore MS#4 to the calendar and transfer MS#4 to the discovery part to be heard by the Justice that signed the order that the party seeks to reargue, specifically relief requests 2 and 3 of the motion. All other requests for relief in MS#5 are hereby respectfully referred to the CCP as they are all discovery issues.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
September 3, 2024

ENTER FORTHWITH:

HON. RICHARD VELASQUEZ

Hon. Richard Velasquez, JSC

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KINGS COUNTY CLERK
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