SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** **PART** **33M**

Justice

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VICTOR ANDRADE,

Plaintiff,

- v -

1203 E NEW YORK AVE OWNER, LLC,PINNACLE COMMERCIAL DEVELOPMENT, INC.

Defendant.

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INDEX NO. 154137/2022

MOTION DATE 07/03/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 47, 48, 49, 50, 51, 52, 53, 54, 55

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

Upon the foregoing documents, and after a final submission date of September 27, 2024, Plaintiff Victor Andrade's ("Plaintiff") motion for summary judgment against Defendants on his Labor Law §§ 240(1) and 241(6) claims is granted in part and is otherwise academic.

I. Background

This is an action to recover damages from personal injuries from alleged violations of the New York Labor Law. On January 28, 2022, Plaintiff was employed as an ironworker for FPL Fabricators & Erectors Group LLC ("FPL"), a subcontractor of Defendant Pinnacle Commercial Development, Inc., ("Pinnacle") at a construction project at 1223 East New York Avenue, Brooklyn, New York (the "Premises"). The owner of the Premises is 1203 E New York Ave Owner, LLC ("Owner"). Plaintiff was required to use a roustabout, a four-wheeled manual crane which uses a crank to lift iron columns (NYSCEF Doc. 41 at 64-66). Due to the weight of the lifted columns, the roustabout flipped over, and Plaintiff was thrown "up in the air" (NYSCEF Doc. 41

at 82-83). Plaintiff now seeks summary judgment on his causes of action for violations of Labor Law §§ 240(1) and 241(6).

II. Discussion

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidence, in admissible form, sufficient to establish material issues of fact which require a trial (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The Court of Appeals has instructed Courts to interpret Labor Law §240(1) liberally to accomplish its purpose of ensuring workers are properly protected against elevation related hazards (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513 [1985]).

Plaintiff's motion for summary judgment on his Labor Law § 240(1) claim is granted. Here, there is a *prima facie* violation of Labor Law § 240(1). It is undisputed that Plaintiff was a worker engaged in the erection of a building and had permission to be on the Premises. It is further undisputed that the Defendants are proper statutory defendants under Labor Law § 240(1). There is no dispute that Plaintiff was injured from a gravity related peril when he was thrown into the air while using a hoisting device to move heavy iron beams. The use of Plaintiff as a counterweight to steady the roustabout as it hoisted a heavy iron beam is *prima facie* evidence that the roustabout was inadequate (*see e.g. Iuculano v City of NY*, 214 AD3d 535 [1st Dept 2023] ["people are not safety devices within the meaning of Labor Law § 240(1)]). An injury arising from operation of an inadequate hoist is *prima facie* evidence of a Labor Law §240(1) violation (*Hayek v Metropolitan Transportation Auth.*, 195 AD3d 568 [1st Dept 2021]). When the roustabout failed

and flung Plaintiff in the air, there was a violation of Labor Law § 240(1) (*see Gallegos v Bridge Land Bestry, LLC*, 188 AD3d 566 [1st Dept 2020]).

Although Defendants argue summary judgment is premature because they have not been deposed, summary judgment is only properly denied pursuant to CPLR 3212(f) when the outstanding discovery is in the exclusive possession of the movant. Defendants have access to their own corporate representatives who have not been deposed (*Guzman-Sauisili v Harlem Urban Dev. Corp.*, 231 AD3d 685 [1st Dept 2024]; *Sotelo v TRM Contracting, LP*, 212 AD3d 488 [1st Dept 2023]).

Nor is the affidavit of Mario Naula sufficient to defeat Plaintiff's motion. As a preliminary matter, Mr. Naula admits in the affidavit that he did not witness the accident, and he previously swore under penalties of perjury that he does not recall any information about Plaintiff's accident (*cf.* NYSCEF Docs. 48 and 52). Moreover, Mr. Naula's affidavit in opposition does not dispute that the accident occurred and that the roustabout failed. He merely states in conclusory fashion that the roustabout was not defective. Further, although Mr. Naula states in his affidavit that he instructed Plaintiff to not stand on the legs of the roustabout, this failure to heed instructions amount to at most comparative negligence, which is not a defense to a violation of Labor Law § 240(1) (*Rodas-Garcia v NYC United* LLC, 225 AD3d 556 [1st Dept 2024]; *Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541 [1st Dept 2022]).

As Plaintiff has met his *prima facie* burden of showing a Labor Law § 240(1) violation, and Defendant has failed to raise a material issue of fact in opposition, Plaintiff's motion for summary judgment on the issue of liability for his Labor Law § 240(1) violation is granted (*see also Brown v VJB Constr. Corp.*, 50 AD3d 373, 377 [1st Dept 2008]). Because Plaintiff is granted

summary judgment on his Labor Law § 240(1) claim, his Labor Law §241(6) claim is academic (*Malan v FSJ Realty Group II LLC*, 213 AD3d 541 [1st Dept 2023]).

Accordingly, it is hereby,

ORDERED that Plaintiff's motion for summary judgment on the issue of liability related to his Labor Law § 240(1) claim is granted; and it is further

ORDERED that Plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 241(6) claim is academic; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

1/21/2025
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, 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