SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY **PART** 28M

Justice

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MICHAEL CAROTHERS,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA CAPITAL CONSTRUCTION, CITY OF NEW YORK, MLJ CONTRACTING CORP.

Defendant.

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INDEX NO. 151076/2021

MOTION DATE 10/08/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

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

Procedural History

On January 31, 2021, Plaintiff Michael Carothers ("Plaintiff"), commenced this action with the filing of a Summons and Complaint against The New York City Transit Authority ("NYCTA"), Metropolitan Transportation Authority ("MTA"), MTA Capital Construction ("MTACC"), City of New York ("CNY"), MLJ Contracting Corp. ("MLJ") (collectively referred to as "Defendants"). *(See, NYSCEF Doc Nos. 01, 20)*. On April 26, 2021, Defendants filed their Answer (*See, NYSCEF Doc. No. 10)*. In the Complaint, plaintiff asserts negligence and violations of New York Labor Law against all Defendants. (*See, NYSCEF Doc. No. 1*).

Before this Court is the motion filed by Plaintiff for an Order granting summary judgment on the issue of liability against Defendants (*See, NYSCEF Doc. No. 18*). Defendants filed opposition. (*See, NYSCEF Doc. No. 34*). Plaintiff filed a reply (*See, NYSCEF Doc. No. 35*).

I. Background

This action stems from an alleged construction accident that occurred on July 2, 2020, while Plaintiff performed work at MTA's Chambers Street Station in New York, New York. The MTA defendants, the Owners/Contracting parties, hired defendant MLJ, the General Contractor in charge of this project. At the time of the accident, plaintiff was a Union Structural Steel

Ironworker employed by non-party, Tyrek Heights ("Tyrek"), to perform various steel duties on the premises. Plaintiff alleges that while he was performing work on an elevator shaft, he was caused to slip and fall on debris, then lost his balance and fell about four to five feet into a shaft opening, landing at the bottom of the shaft. As a result of the fall, the plaintiff alleges he sustained numerous serious injuries and had undergone three surgeries rendering him disabled.

II. Plaintiff's Motion for Summary Judgment

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such *prima facie* showing requires denial of the motion, regardless of sufficiency of the opposing paper." *See, Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Under *CPLR §3212*, "[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *See, CPLR §3212*. "Summary judgment is a drastic remedy, to be granted only where the moving party has rendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *See, Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) [internal citation and quotation marks omitted].

a. Labor Law §240(1)

Labor Law §240(1), also known as "New York's Scaffold Law" imposes "absolute liability on building owners and contractors whose failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker." *Wilinski v. 334 E. 92nd Hous. Dev. Fund. Corp.*, 18 N.Y.3d 1, 7 (2011). The Scaffold law 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." *See, N.Y. Labor Law § 240(1).*

The legislative intent behind the statute is to place the "ultimate responsibility for safety practices at building construction jobs…on the owner and general contractor, instead of on

workers, who are scarcely in a position to protect themselves from accident." *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 520 (1985). To prevail in a *Labor Law § 240(1)* cause of action, the plaintiff must establish that the violation of the statute was a proximate cause of his or her injuries. *Blake v. Neighborhood Hous. Servs. of New York City, Inc.*, 1 N.Y.3d 280, 286 (2003). The duty imposed by *Labor Law § 240(1)* is nondelegable, meaning that an owner or contractor who violates this duty can be held liable for damages, regardless of whether they exercised actual supervision or control over the work. *See, e.g., Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136–137 (1978). Liability under the Scaffolding Law depends upon the injury having resulted from "the failure to use, or the inadequacy of ... a device" within the purview of the statute. *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 340 (2011) (internal quotation marks omitted). "[T]here can be no liability under section 240(1) when there is no violation and the worker's actions ... are the sole proximate cause of the accident." *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35, 40 (2004).

In support of their motion, plaintiff submits, *inter alia*, the plaintiff's 50-H and deposition transcript (*see, NYSCEF Doc. Nos. 21 and 23*); the deposition transcript of Jamil Amir, the superintendent for Defendant MLJ's Contracting (*See, NYSCEF Doc. No. 22*); and the affidavit of James Perrone, the foreman for non-party Tyrek Heights (*See, NYSCEF Doc No. 26).*

Plaintiff argues that summary judgment as a matter of law, pursuant to *Labor Law §240(1)*, should be granted in his favor because while the plaintiff was "performing work in conjunction with one of the elevator shafts" he was injured. Specifically, plaintiff alleges that while he was "in the process of walking, he was caused to slip and fall on debris, losing his balance and falling into an unprotected shaft opening, landing at the bottom of the shaft, a fall height of approximately 4 to 5 feet below, sustaining numerous serious injuries, ultimately resulting in three surgeries, all rendering him totally disabled to date from his normal vocation as a structural steel ironworker." (*See, NYSCEF Doc. No. 19).*

At his deposition, plaintiff argues that at the time of the accident there was no protection around the shaft, although he had seen protection around the shafts, however, not at the time of the accident. *(NYSCEF Doc No. 23, at pages 26 - 27)*. Plaintiff submits the affidavit of eyewitness Foreman James Perrone ("Foreman Perrone"), who testified that "[o]n the date of the accident….there was garbage and debris all over the place…and made numerous complaints to the General Contractor in charge, MLJ,…yet most of the time nothing was ever done...cleaning of

debris not part of our duties… we are not permitted to do so, rather we have to allow the laborers to do so, and on this job, they were employed by MLJ Contracting directly." *(See, NYSCEF Doc No. 26).* Foreman Perrone further testified that "[t]here was absolutely no protection around the shaft at the time of the accident. There was no guardrails in place around the shaft like MLJ had had at times in the past…there was no horizontal protection in place to cover the actual opening, such as safety netting, scaffolding… the debris in the accident location had nothing to do with our work either… Michael (Plaintiff) was following all of my instructions that day, and he did nothing improper at the time of the accident…the fall height into the shaft was 4 to 5 feet…there was no swinging gate protection around the shaft opening or work area either at the time of the accident... [n]or were there warning signs." *(See, NYSCEF Doc No. 25).*

Jamil Amir ("Mr. Amir"), the Superintendent for defendant MLJ, testified that he was not an eyewitness to the accident, however, he received a call advising him that one of the ironworkers fell into the elevator pit. *(See, NYSCEF Doc No. 22, at pages 64 - 66).* Mr. Amir further testified that the distance from the area around the shaft to the bottom of the shaft is approximately 4 to 5 feet, and the size of the shaft itself was 10 x 10 feet. *(Id. at page 63).* Mr. Amir testified that MLJ, through its own carpenters, were responsible for providing and maintaining protection around the shaft openings, which were typically 2 x 4 feet in size. *(Id. at pages 42-43,48).*

To the contrary and in opposition, the defendants argue the plaintiff failed to make a *prima facie* showing of entitlement to summary judgment because plaintiff has not established, *inter alia*, that there was a violation of *Labor Law §240(1).* Specifically, the defendants' position is that the elevator shaft with a four-foot drop is simply not the type of special hazard protected under *Labor Law §240(1).* Defendants argue that there is a question of fact as to whether a protective guard was needed for the elevator shaft, and therefore, the plaintiff's motion for summary judgment should be denied.

In addition, defendants submit the testimony of Mr. Amir, who testified that there were no complaints about the debris on the platform level around the shaft on the date of the accident *(NYSCEF Doc No. 22, at page 96).* Defendants submit that Foreman Perrone's affidavit was designed to help Plaintiff without showing any proof of any violation of the Labor Law, and Foreman Perrone's claims that certain types of fall protection devices could have been used around the opening of the shaft, however, he does not establish what type of fall protection device should have been used. *(NYSCEF Doc No. 25).*

For a claim under *Labor Law § 240(1)* to succeed, "the plaintiff must demonstrate that the task involved a significant risk related to elevation and that the safety devices specified by the statute—such as scaffolds or harnesses—were necessary to protect against this risk. These devices are intended to shield workers from the dangers of falling from a height or being struck by a falling object." *Labor Law § 240(1)*; *see also*, *Broggy v. Rockefeller Grp., Inc.*, 8 N.Y.3d 675, 680 (2007). The Court of Appeals explained in *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 514, 577 N.Y.S.2d 219, 583 N.E.2d 932 (1991), that "*Labor Law § 240(1)* is intended to protect against risks caused by 'the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured.' With this concern at the forefront, *Labor Law §240(1)* imposes strict liability on owners and contractors for accidents arising from the absence of, or defects in, such protective devices as ladders and scaffolds." *Thompson v. St. Charles Condominiums*, 303 A.D.2d 152, 153 (1st Dept 2003).

Based on the foregoing arguments presented, this Court finds that the plaintiff has met the burden for summary judgment as against defendants. Specifically, plaintiff testified that Foreman Perrone directed him to work on modifying one of the elevator shafts, which was 4 feet deep. *(NYSCEF Doc No. 21, at pages 96 and 103).* Plaintiff testified that the working area was a mess with debris, and the foreman reported the conditions to the General Contractor. *(Id. at pages 136-137)*. Plaintiff testified that the laborers working for MLJ were responsible for cleaning up the debris on site. *(Id. at page 201).* Plaintiff also testified that while he was walking back towards where he was performing the cutting work, he slipped on debris and fell into the elevator shaft, spinning around in the process, and landed on his back. *(Id. at pages 147-150, 152).*

Here, defendants shall be held strictly liable for the alleged elevation risk and the absence of protective devices to prevent the subject incident from occurring. "*Labor Law §240(1)* imposes strict liability on owners and contractors for accidents arising from the absence of, or defects in, such protective devices as ladders and scaffolds." *Labor Law §240(1)*; *see also*, *Thompson v. St. Charles Condominiums*, 303 A.D.2d 152, 153 (1st Dep't 2003). Here, the owners of the premises were the MTA defendants, who contracted MLJ as the general contractor for the project. The defendants are subject to the strict liability standard imposed on owners and contractors under *Labor Law §240*. The plaintiff submits that he and his supervisor testified that the elevator shaft measured 4 to 5 feet deep. Specifically, MLJ's supervisor, Mr. Amir testified that the distance from the area around the shaft to the bottom of the shaft is approximately 4 to 5 feet, and the size

of the shaft itself was 10 x 10 feet. Foreman Perrone further testified that "[t]here was absolutely no protection around the shaft at the time of the accident." To the contrary, the defendants assert that the photographs of the elevator shaft do not show a depth of 4 to 5 feet, and that the Plaintiff's fall was *de minimus*. Nonetheless this Court, finds that the defendants fail to dispute the elevation risk the plaintiff was faced with while performing his work because *Labor Law §240(1)* imposes strict liability on owners and contractors for accidents arising from the absence of, or defects in, such protective devices as ladders and scaffolds. *Id.* Therefore, the portion of Plaintiff's motion for summary judgment regarding the *Labor Law §240(1)* claim as against defendants is granted.

b. *Labor Law §241(6)*

In the motion, the plaintiff argues that *Labor Law §241(6)* applies because the defendants violated *Industrial Code Rules 23-1.7(b)* and *23-1.7(d)*. *Labor Law §241(6)* requires owners and contractors to provide reasonable and adequate protection and safety for construction workers. *Labor Law §241(6)*; *see e.g., Gervasi v. FSP 787 Seventh LLC*, 228 A.D.3d 459 (1st Dep't 2024). Specifically, the statute "imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed." *Ochoa v. JEM Real Estate Co., LLC*, 223 A.D.3d 747, 749 (2d Dep't 2024).

i. Industrial Code Rule 23-1.7(b)

Industrial Code Rule 23-1.7(b) refers to falling hazards and provides:

> "(i) Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule)."

12 NYCRR 23-1.7. (1972).

Industrial Code Rule 23-1.7(d) refers to Slipping Hazards and provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing." *Id.*

In the motion, the plaintiff also argues the presence of debris and garbage caused him to slip and fall, and such hazardous conditions are in direct violation of *Labor Law §241(6)*. Plaintiff specifically contends that there was no protection around the opening around the shaft, which was

also a violation of *Industrial Code Rule 23-1.7(d)*. Plaintiff asserts there is no dispute that he slipped and fell on the debris, and the Courts have continually upheld the finding of summary judgment in favor of a plaintiff who slips and falls on debris left in the workplace. *See, Serrano v. Consolidated Edison Co. of N.Y. Inc.,* 146 A.D.3d 405, 406 (1st Dep't 2017). In opposition, the defendants argue that the plaintiff did not demonstrate that there was a lack of reasonable care, there was no notice of any defective condition, and Plaintiff has not shown that he slipped on ice, snow, water, grease, and any other foreign substance which may cause slippery footing.

Here, this Court finds that the plaintiff has satisfied the requirements under *Industrial Code Rule 23-1.7(b)* because the elevator shaft was not protected, guarded, or provided with warning signs. *See, Industrial Code Rule 23-1.7(b).* Additionally, this Court finds that the plaintiff satisfied the requirements under *Industrial Code Rule 23-1.7(d)* based on the sworn statements submitted by the plaintiff and Foreman Perrone that debris/garbage was on the ground, which may have caused the plaintiff to slip and fall. *(See, Industrial Code Rule 23-1.7(d)).* As such, the portion of plaintiff's motion for summary judgment as to *Labor Law § 241(6)* claim predicated on violation of *Industrial Code Rule 23-1.7(b) and (d))* is granted against the defendants.

c. *Labor Law §200*

Labor Law §200 claims arise from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed. *See, N.Y. Labor Law §200.* In the motion for summary judgment, the plaintiff argues that his injuries arose from a dangerous condition at the work site, and the defendants are liable because the MTA defendants, the admitted Owners/Contracting parties, who hired the admitted General Contractor in charge of this project, defendant MLJ Contracting had control over the work site and had actual or constructive notice of the dangerous condition. Plaintiff asserts Defendant MLJ had the duty to clean the debris on the premises, and to provide protection around the elevator shaft. *(See, NYSCEF Doc. No. 19).*

Here, the plaintiff has satisfied the requirements under *Labor Law §200* because defendant MLJ was the General Contractor at the worksite (*see, NYSCEF Doc. No. 22, pages 18-19)* and *Labor Law §200* applies to owners, general contractors, and their statutory agents. *(See, Rodriguez v. Riverside Ctr. Site 5 Owner LLC,* 234 A.D.3d 623 (N.Y.A.D. 1 Dept., Jan. 28, 2025). Specifically, the plaintiff has established through the deposition testimony of Plaintiff Michael Carothers *(NYSCEF Doc. No. 23),* the superintendent for Defendant, MLJ Jamil Amir *(NYSCEF*

Doc No. 22), and the affidavit of Plaintiff's Foreman, James Perrone *(NYSCEF Doc No. 25)*, that Defendant MLJ had a duty to maintain a worksite without debris and garbage on the ground, and that the worksite was under the control of the contractor, defendant MLJ. (*See, NYSCEF Doc. No. 25; NYSCEF Doc. No. 22 at pages 48-49).* As such, Plaintiff's motion for summary judgment as to the *Labor Law §200* claim is also granted.

III. Conclusion

Accordingly, it is hereby

ORDERED that the portion of Plaintiff Michael Carothers' motion for summary judgment regarding the *Labor Law §240(1)* claim against Defendants, The New York City Transit Authority, Metropolitan Transportation Authority, MTA Capital Construction, City of New York, and MLJ Contracting Corp. is GRANTED; and it is further

ORDERED that the portion of the Plaintiff's motion for summary judgment against Defendants, The New York City Transit Authority, Metropolitan Transportation Authority, MTA Capital Construction, City of New York, and MLJ Contracting Corp. regarding the *Labor Law §241(6)* claim predicated on violation of *Industrial Code Rule 23-1.7(b) and (d)* is GRANTED; and it is further

ORDERED that the portion of the plaintiff's motion for summary judgment regarding the *Labor Law §200* claim as against Defendants, The New York City Transit Authority, Metropolitan Transportation Authority, MTA Capital Construction, City of New York, and MLJ Contracting Corp. is GRANTED; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all parties with notice of entry.

4/1/2025
DATE

LISA S. HEADLEY, 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