Supreme Court of the State of New York
County of Kings

Index Number 515696/2021
Seqs. 004

Part LL1M

DECISION/ORDER

ROBERTO C. MALDONADO ORTIZ,

Plaintiff,

against

MYRTLE FLATS LLC AND SUNSHINE CONSTRUCTION USA INC.,

Defendants.

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Var.
Other	

Upon the foregoing papers, plaintiff's motion for summary judgment (Seq. 004) is decided as follows:

Introduction and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained on May 27, 2021, when he was working on the premises located at 622 Myrtle Avenue, Brooklyn, NY 11205 (the premises). It is undisputed that Myrtle Flats LLC (Myrtle) owned the premises and that Sunshine Construction USA Inc. (Sunshine) was the general contractor for the construction work being performed at the premises. Sunshine sub-contracted with non-party JCC Services NY Inc. (JCC), and JCC employed the plaintiff as a general foreman.

Plaintiff testified as follows: On the date of the incident, plaintiff was involved in the project of building a basement foundation and walls (Ortiz EBT at 119). The work was performed from the floor, but the ceiling was approximately eight or nine feet high and the forms extended almost to the ceiling (*id.* at 69–70). The walls had been planned, fitted with rebar, outfitted with plywood formwork, and the concrete had been poured (*id.* at 121–123).

On the date of the incident, plaintiff's JCC co-workers were stripping forms from the walls (*id.* at 136–137). The stripping work involved removing all but two of the tie pins that secured the forms to the wall. Then, working form-by-form, workers would remove the final two tie pins and use a crowbar to pry the form off of the concrete wall (*id.* at 130–135). This work was also performed at floor level (*id.* at 71–72).

Immediately prior to the incident, plaintiff was kneeling on the ground cutting rebar (*id.* at 142). Another JCC employee plaintiff identified as "Nelson" began to strip the form "in front of" the plaintiff (*id.* at 153). Plaintiff instructed Nelson to move farther away, and Nelson moved approximately seven feet to the right to work on another form (*id.* at 153–154). Plaintiff testified that this was still "too close," but plaintiff "didn't notice" how far Nelson moved because plaintiff "was bent over focused on cutting the rebar" (*id.* at 154, 158). After Nelson moved, plaintiff visually observed that the tie pins were still in place on the form that Nelson had been working on (*id.* at 161–162). Plaintiff then bent over to continue cutting rebar when he heard someone say, "Be careful" (*id.* at 142). Plaintiff was knocked unconscious by a falling object and was not able to identify which form fell onto him "because [he] was looking down to the floor" (*id.* at 160, 173). Plaintiff testified that Nelson "apologized" and said "that he didn't know the form was going to fall" (*id.* at 172). There is neither an affidavit nor deposition testimony from Nelson as to which form he was referencing.

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the

non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Labor Law § 240 (1)

Liability under Labor Law § 240 (1) is "absolute" where the failure or absence of a safety device enumerated by the statute is a proximate cause of the plaintiff's accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 287 [2003] [citing *Haimes v. New York Tel. Co.,* 46 NY2d 132, 136 (1978) and *Ross v Curtis-Palmer HydroElec. Co.*, 81 NY2d 494, 500 (1993)]). In order to recover for an injury caused by a falling object, a plaintiff must show that the object was being hoisted, secured, or required securing for the purpose of the undertaking (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]).

The plaintiff testified that he was struck by a form, and his testimony that Nelson apologized is unrebutted circumstantial evidence that it was a form Nelson had worked on (*Rios v 474431 Assoc.*, 278 AD2d 399, 399 [2d Dept 2000]; *see also* PJI 1:70). The record indicates that either the form Nelson had been attempting to remove was improperly secured and fell on plaintiff or the form Nelson was actively stripping was improperly handled and fell on plaintiff, either of which would constitute a Labor Law violation (*Keen v Tishman Construction Corporation of New York*, 233 AD3d 1001 [2d Dept 2024]).

Defendants do not deny that plaintiff was struck, nor do they offer an alternative claim as to what object struck plaintiff. That said, the Second Department has held that a plaintiff will not prevail at the summary judgment stage where he cannot definitively identify the object that struck him (*see Crichigno v Pacific Park 550 Vanderbilt, LLC*, 186 AD3d 664 [2d Dept 2020]; *see also Joya v E 31 Partners, LLC*, 240 AD3d 861 [2d Dept 2025]; *Henriquez v Grant*, 186 AD3d 577 [2d Dept 2020]; *Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733 [2d

Dept 2015]). Therefore, the court feels constrained to deny plaintiff's motion in this case as to Labor Law § 240 (1).

Labor Law § 241 (6)

To prevail on a cause of action pursuant to Labor Law § 241 (6), plaintiff must show that he was (1) on a job site, (2) engaged in qualifying work, and (3) suffered an injury, (4) the proximate cause of which was a violation of an Industrial Code provision (*Moscati v Consolidated Edison Co. of N.Y., Inc.*, 168 AD3d 717, 718 [2d Dept 2019]). Plaintiff only advances arguments as to the alleged violation of Rule 2.2 (a), which requires that "Forms, shores and reshores shall be structurally safe and shall be properly braced or tied together so as to maintain position and shape." Plaintiff provided an expert affidavit from Anthony Corrado, CHST, LSSM, who opined that Rule 2.2 (a) is applicable even when forms are being stripped because workers should use "ropes, temporary cross-bracing, retention chains, or other similar devices" (Corrado aff. at ¶ 41). However, since the plaintiff is unable to provide factually specific testimony sufficient to establish which form fell and what state it was in, and since plaintiff's expert was not a fact witness, plaintiff's motion for summary judgment on this claim is also denied (*see Ross v DD 11th Ave., LLC*, 109 AD3d 604 [2d Dept 2013]).

Conclusion

Plaintiff's motion for summary judgment (Seq. 004) is denied.

This constitutes the decision and order of the court.

October 6, 2025
DATE

DEVIN P. COHEN
Justice of the Supreme Court