Booth v One Sixteen, Inc.

2025 NY Slip Op 35271(U)

April 23, 2025

Supreme Court, New York County

Docket Number: Index No. 154209/2021

Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHLOMO S. HAGLER **PART** 17

Justice

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GLENN BOOTH

Plaintiff,

- v -

ONE SIXTEEN, INC.,

Defendant.

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INDEX NO. 154209/2021

MOTION DATE 12/28/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 59, 61, 65, 66, 67, 68, 69, 70, 71, 76, 78, 79, 80, 81, 82, 83, 87, 89, 90, 91

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

In this action to recover damages for personal injuries allegedly sustained by plaintiff Glenn Booth, plaintiff moves, pursuant CPLR 3212, for an order granting summary judgment on the issue of liability on the Labor Law § 240(1) and §241(6) claims against defendant One Sixteen, Inc. Defendant opposes the motion.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of an accident on April 2, 2021, in which plaintiff was injured after the scaffolding he had been working on collapsed in defendant's building located at 116-118 Franklin Street, New York, New York (NYSCEF Doc. No. 1, ¶¶ 3, 11). In his complaint, filed on April 30, 2021, plaintiff alleged that while he had been working inside defendant's building on a staircase, he fell from a wooden scaffold wedged against defendant's ladder and the staircase; that his injuries were caused by defendant's negligence; and that as a result of the incident, he sustained

injuries that left him unable to walk (*id.*). Plaintiff also claimed that defendant or its agents, servants, and employees, knew of the defective and unsafe conditions (*id.*).

Plaintiff Glenn Booth's Deposition Testimony

At his deposition, plaintiff testified that he did work for John Rosenmiller ("Rosenmiller"), owner of One Sixteen, Inc. at 116 Franklin Street and several other of Rosenmiller's buildings (NYSCEF Doc. 35, pg. 26, lines 3-7). Plaintiff had been doing work for Rosenmiller for approximately 15 years (*id.* at pg. 27, lines 4-7). Plaintiff further testified that he met Noah Lamy ("Lamy"), the late superintendent and handyman for the One Sixteen Franklin building, approximately 15 years ago (*id.* at pg. 39, lines 13-14). According to plaintiff, the type of work he would do at 116 Franklin and other One Sixteen, Inc. properties was typically labor related, and that it included work such as carpentry, painting, welding, bathroom tiling, and storefront renovation (*id.* at pg. 42, lines 12-22). Plaintiff also testified that occasionally Mr. Lamy would "set things up for me, you know, and tell me what John wanted, you know, done and, you know, he would check on me, you know, call John or John would call him" (*id.* at pg. 61, lines 15-19). As for who assigned the projects, both Rosenmiller and Lamy would instruct plaintiff to do work on the building (*id.* at pg. 61, line 25 - pg. 62, line 4). In terms of supervision, plaintiff testified that from time-to-time Rosenmiller would observe his work in person and would supervise by giving specific directions. Rosenmiller would often check in on the work in progress and give instructions on what he wanted done (*id.* at pg. 65, line 9 - pg. 66, line 23). Plaintiff also testified that either Rosenmiller or Lamy would usually be in the building when he was performing work, and noted that he was not aware of a time when one of them was not in the building (*id.* at pg. 67, lines 12-24). According to plaintiff, Rosenmiller supplied most of his tools, including paintbrushes (*id.* at pg. 68, line 25 - pg. 69, line 25).

Plaintiff testified that he typically would communicate with Rosenmiller via email or phone, though the predominate form of communication was by phone call (*id.* at pg. 94, lines 19-21) and that, at times, Rosenmiller would leave physical notes on his apartment table or counter detailing a list of things he wanted done (*id.* at pg. 96, lines 22-25; *id.* at pg. 97, lines 4-12). Plaintiff also testified that although he would come to work ready to perform specific, previously communicated tasks, "John Rosenmiller would change, sometimes. Decide he wants something else" (*id.* at pg. 100, lines 20-25).

Plaintiff testified that he went into work on April 2nd expecting to paint (*id.* at pg. 101, lines 3-8). When he arrived, however, Lamy told him that "[Rosenmiller] wanted [plaintiff] to paint the top hallway, stairwell" and that Lamy had set up a scaffold structure so plaintiff could complete the work (*id.* at pg. 102, line 21 – pg. 103, line 3). Plaintiff testified that there are three short staircases between the fifth floor and the sixth floor, i.e., the roof (*id.* at pg. 55, line 13 – pg. 56, line 5; *id.* at pg. 58, lines 2-8).

Plaintiff testified that the scaffold structure consisted of a ladder against the wall, and a 10- to 12-foot-long board that was set against the ladder on its top rung and the top landing in the stairwell (*id.* at pg. 102-104; *id.* at pg. 128, lines 2-24). Plaintiff also testified that a similar scaffolding structure had been provided and used in the past (*id.* at pg. 104, lines 17-22). Plaintiff further testified that he checked to see if the scaffold was sturdy by walking on and underneath it, and by hanging on it (*id.* at pg. 182, lines 4-14). Plaintiff testified that the tools he picked up for his work that day included "some paint, a brush, some scraping tools, paint, a small paint bucket, a drop cloth . . . [and] a couple of batteries" (*id.* at pg. 112, lines 7-15).

Plaintiff testified that he set the drop cloth between the fifth and sixth floor, and noted that he put his materials on the landing next to the exit door (*id.* at pg. 114, line 14 – pg. 115, line 12).

Notably, he placed the small paint bucket and the brush he used for painting on the top landing (*id.* at pg. 134, lines 3-11). After plaintiff set up, he spoke with Rosenmiller and performed some tasks in Rosenmiller's apartment before returning to the scaffolding to work. (*id.* at pg. 114; *id.* at pg. 117, lines 2-13). Plaintiff further testified that although Rosenmiller came out to check on him while he worked on the day of the accident (*id.* at pg. 125, lines 8-24), Rosenmiller only came out while plaintiff was scraping, not while he was painting (*id.* at pg. 135).

Plaintiff testified that he had finished most, but not all, of his painting when the accident occurred (*id.* at pg. 134, lines 20-23) and that in the moment before the accident he was painting the wall in front of him (*id.* at pg. 152, lines 6-17). Plaintiff testified that at the time of the accident the board under his feet broke and the ladder fell towards the east wall. Plaintiff fell down past the landing where the ladder was placed and near the bottom of the stairs next to the landing leading to Rosenmiller's door (*id.* pg. 152, line 20 – pg. 153, line 18).[1]

Plaintiff testified that no one else was around to witness the accident (*id.* at pg. 156, lines 2-8). After the accident occurred, plaintiff testified that he called for assistance and that Rosenmiller came out from his apartment and went down the stairs to get help from Lamy (*id.* at pgs. 156-157). After Mr. Lamy arrived, plaintiff testified that Lamy and Rosenmiller got a chair and, with the assistance from the tenant on the fourth floor, they carried plaintiff to the elevator (*id.* at pg. 157). Plaintiff testified that no one took any pictures or videos of the accident site prior to the visit to the hospital (*id.*).

[1] The testimony reflects that there are two doors to Rosenmiller's apartment, the first being on the fifth floor, which is the one referred to here, and the second being a door which is only accessible by going outside onto the roof or "sixth floor" (*id.* at pg. 56, lines 6-25 – pg. 57, lines 2-13).

John Rosenmiller's Deposition Testimony

Rosenmiller testified that he is the president of One Sixteen Inc., which owns the building located at 116 Franklin Street, where the subject accident occurred (NYSCEF Doc. 39, pg. 10, lines 10-11; *id.* at line 19 – pg. 11, line 3). Rosenmiller further testified that he lives in the top unit in the building, number five, and that this unit comprises one and a half stories (*id.* at pg. 15, lines 6-13). The "half" story, or mezzanine level, of his apartment has an outdoor space which is located on the roof of the building (*id.* at pg. 61, lines 7-16). Rosenmiller testified that between the fifth and sixth floors, where the accident occurred, there are two landings between the fifth-floor landing and the sixth floor or roof landing. (*id.* at pg. 87, line 22 - pg. 88, line 10).

Rosenmiller testified that One Sixteen previously had a resident superintendent, Lamy, now deceased, who maintained an office in the basement of the building (*id.* at pg. 42, lines 4-22). Rosenmiller further testified that Lamy's job included plumbing, oversight work, accepting packages, and other detailed matters, and that he also provided access to the basement for boiler or Con Ed service personnel (*id.* at lines 10-22). Rosenmiller testified that as of the date of the deposition, the only employee of One Sixteen, Inc. was Stephanie Diaz, who worked as an assistant (*id.* at pg. 17, lines 5-25).

Rosenmiller testified that plaintiff served as an independent contractor for One Sixteen Incorporated (*id.* at pg. 80, lines 13-16). He further testified that when plaintiff came to the building to perform work, it was common practice for him to review with plaintiff what assignments were to be done that day (*id.* at pg. 92, lines 12-23).

Rosenmiller testified that he recalled that plaintiff had been in the building that day to do some work (*id.* at pg. 92, lines 16-20). When asked specifically what the nature of the work was, Rosenmiller testified that he "recall[ed] a couple of things that we had discussed," including

removing dust from the smoke detectors, removing plastic from a window and checking light bulbs "possibly" (*id.* at lines 19-25; *id.* at lines 2-4). Further, Rosenmiller testified, "I don't recall [plaintiff] doing anything. I recall what he discussed he would do" (*id.* at pg. 93, lines 10-11). However, when asked whether plaintiff did any painting on the day of the accident, Rosenmiller responded "No. To the best of my knowledge, no" (*id.* at pg. 94, lines 15-19). Further, when asked whether plaintiff came into Rosenmiller's apartment the day of the accident to repair a damaged ceiling, Rosenmiller testified "no" (*id.* at pg. 109, lines 16-18).

Rosenmiller testified that he was not present at the time of the accident (*id.* at pg. 65, lines 12-14), and was instead in his own apartment. (*id.* at pg. 83, lines 16-21). In fact, Rosenmiller was not aware the accident occurred until he heard a knock on his door and came outside (*id.* at pg. 83, lines 16-21). Upon answering his door, Rosenmiller testified that he saw plaintiff "sitting on [the] second or third step next to the door. He was in pain. He said he was in pain. I saw an anguished look on his face. That's what I saw" (*id.* at pg. 84, line 25 – pg. 85, line 4). Rosenmiller clarified that when he spoke of the hallway he was referring to the stairwell and the landing spaces (*id.* at pg. 66, lines 5-14).

Rosenmiller testified that although plaintiff told him that "he was in the hallway and said he fell" (*id.* at pg. 65, line 24 – pg. 66, line 2), Rosenmiller had no personal knowledge of what happened during plaintiff's accident (*id.* at pg. 83, lines 2-5; *id.* at pg. 85, lines 23-24). Rosenmiller further testified that plaintiff did not tell him whether he had been working at the time of the fall (*id.* at pg. 83, lines 6-8). Rosenmiller did not know what floors plaintiff had been working between, just that he had been in the stairwell (*id.* at lines 9-15; *id.* at pg. 92, lines 10-15). Rosenmiller also testified that, on the day of the accident, he had only seen plaintiff on the first floor when he arrived and in the elevator in his apartment (*id.* at pg. 93, lines 24-25; *id.* at pg. 94, lines 2-10).

Rosenmiller testified that he drove plaintiff to the hospital with Lamy (*id.* at pg. 90, lines 16-25). When questioned how long the process was from the knock on his door to when he, plaintiff, and Lamy were on the way to the hospital, Rosenmiller responded that the time was about ten to fifteen minutes (*id.* at pg. 95, lines 3-13). However, contrary to plaintiff's testimony, Rosenmiller testified that he did not believe that a tenant helped Rosenmiller get plaintiff from the stairwell to his car (*id.* at pg. 110, lines 19-22).

Rosenmiller testified that, after he returned to the building from the hospital, he observed a ladder and broken boards in the stairwell of the building on the second landing between the fifth floor and the roof and on the stairs leading to the roof (*id.* at pg. 87, lines 16-17; *id.* at pg. 88, lines 18-25). Rosenmiller did not testify that he saw the ladder or the pieces of the board before he took plaintiff to the hospital, and in fact emphasized that he only saw these things after his return from the hospital (*id.* at pg. 86, lines 18-25; *id.* at pg. 87, lines 2-11). However, Rosenmiller did testify that, most likely, he was the person who cleaned up the stairwell after the accident (*id.* at pg. 110, lines 4-15). Rosenmiller was asked whether he saw any paint or dried paint on the ladder, to which Rosenmiller responded "I can't tell if it's drywell mud, plaster. I can't tell what it is" (*id.* at pg. 114, lines 24-25 – pg. 115 lines 1-2).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tending 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 the sufficiency of the opposing papers . . . " (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once the moving party establishes its prima facie entitlement, in order to defeat the motion the opposing party must "'assemble, lay bare, and

reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018]).

The Labor Law § 240(1) Claim

Plaintiff moves for summary judgment in his favor as to liability on the Labor Law § 240(1) claim against defendant.

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'" (*John v Baharestani*, 281 AD2d 114, 118 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Importantly, Labor Law § 240 (1) "provides protections to workers who are exposed to gravity-related risks. . . [and] 'must be liberally construed to accomplish the purpose for which it was framed'" (*Soriano v. St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 [1st Dept 2014], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *see Carpio v Tishman Constr. Corp. of N.Y.*, 240 AD2d 234, 234-235 [1st Dept 1997]).

Not every worker who falls 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*, 96 NY2d at 267). Therefore, to prevail on a section 240 (1) claim, a plaintiff must show that the statute was violated, and that this violation was the proximate cause of the plaintiff's injuries (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]).

Here, plaintiff has established his prima facie entitlement to summary judgment in his favor on Labor Law § 240(1) claim against defendant because the safety device, i.e. the scaffold, failed to protect him from falling while he performed his work. To that effect, the scaffolding broke under plaintiff's feet, which caused him to fall into the stairwell below and become injured. "Whether the device provided proper protection is a question of fact, except when the device collapses, moves, falls, or otherwise fails to support the plaintiff" (*Nelson v Ciba-Geigy*, 268 AD2d 570, 572 [2d Dept 2000]; *Garcia v Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 AD3d 524, 525 [1st Dept 2017] ["Plaintiff's testimony that the ladder shifted as he descended, thus causing his fall, established a prima facie violation of Labor Law § 240(1)"]; *accord Lizama v 1801 Univ. Assoc., LLC*, 100 AD3d 497,498 [1st Dept 2012]). Moreover, "[t]he fact that a plaintiff is the only witness to an accident does not bar summary judgment where his or her testimony concerning the manner in which the accident occurred is neither inconsistent with nor contradicted by his own account provided elsewhere or other evidence" (*Goreczny v. 16 Ct. St. Owner LLC*,

110 AD3d 465, 466 [1st Dept 2013]; *see Manfredonia v 750 Astor LLC*, 217 AD3d 573, 574 [1st Dept 2023]).

In opposition, defendant first argues that plaintiff was never instructed by defendant, nor its agents, to make or use the scaffolding structure. Specifically, it argues that the wood which was a part of the scaffold was known to be rotten, and that plaintiff would never have been instructed to use this wood for a scaffold. Defendant also argues that Lamy, who allegedly set up the scaffold, was never an employee of Mr. Rosenmiller or One Sixteen, Inc. Finally, defendant contends that plaintiff never sought the use of any equipment or safety devices for his work on the day of the accident, and that plaintiff was aware of other ladders that were available and were more stable than the scaffold. However, any alleged negligence on plaintiff's part—failure to ask for a safety device or to use a different ladder—goes to comparative fault. Comparative fault is not a defense to a Labor Law § 240 (1) cause of action (*see Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Melito v ABS Partners Real Estate, LLC*, 129 AD3d 424, 425 [1st Dept 2015]). A plaintiff cannot be the sole proximate cause of his accident where a defendant "failed to provide an adequate safety device in the first instance" (*Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]; *see Hernandez v 767 Fifth Partners, LLC*, 194 AD3d 649, 649-650 [1st Dept 2021]). Accordingly, the negligence, if any, of an injured worker is of no consequence where an owner or contractor has failed to provide adequate safety devices to protect workers from elevation-related injuries in the first place (see *DaSilva v Toll First Ave., LLC*, 199 AD3d 511, 512-513 [1st Dept 2021]).

Next, defendant argues that there is contradictory evidence regarding whether plaintiff was painting at the time of the accident, thus providing a question of fact as to whether he was performing a covered activity under Labor Law § 240(1). First, defendant points to the email between Rosenmiller and plaintiff dated March 27, 2021 in which Rosenmiller wrote to plaintiff

saying "Friday you'll be here . . . Things on list – take down plastic on windows, replace some bulbs in apt and hall, maybe check smoke detectors in hall, snd[sic] be others Sound good?" to which plaintiff responded on March 29, 2021 "Sounds good" (NYSCEF Doc No. 26, at 2). Defendant argues that this email shows that plaintiff was never asked to paint and further avers that the authenticity of this email has never been disputed. However, the reference in the last section of the email "snd[sic] be others" could denote other unnamed tasks that would be discussed at a later date, and plaintiff testified that the directions given Rosenmiller sometimes changed. Moreover, although defendant argues that it was custom and practice to review with plaintiff the work to be done, defendant has not provided evidence showing or referencing any such conversation on the day of the incident.

Defendant also argues that there was no physical evidence that plaintiff performed any painting that day or at the time of the accident and that this presents a question of fact as to whether plaintiff was conducting a covered activity. Defendant contends that although Rosenmiller was not present during any of the activities in the stairwell, as soon as he was informed of the accident, he proceeded into the stairwell to assist plaintiff. In his affidavit, Rosenmiller averred that

> [a]s soon as Glenn informed me of the accident, I proceeded into the stairwell to assist him. While in the stairwell, I observed there were no paint cans, paint buckets, brushes, rollers, paint pans or drop cloths or any other tools. There was no evidence at all that Glenn had been performing any painting in the stairwell on that day. . . In fact, to the best of my recollection, the walls and ceiling in the hallways or in or around the area Glenn claims to have been painting at the time of the accident have not been painted since 1994 (NYSCEF Doc. No. 67, pg. 3, paragraph 12).[2]

[2] In his Affirmation in Opposition (NYSCEF Doc. No. 66), which was sworn pursuant to CPLR § 2106, Mr. Rosenmiller uses slightly different language, stating that "I would have observed if there were any paint cans, paint buckets, brushes, rollers, paint pans or drop cloths or any other tools. There was none. There was no visible fresh paint on the walls or ceilings or anywhere in the stairwell and no smell of fresh paint" (*id.* at pg. 3, paragraph 12).

Defendant contends that Rosenmiller observed the accident scene after the incident and that there was no evidence of any painting or related materials. Accordingly, defendant argues that there is nothing to support plaintiff's claim that he was painting.

Defendant argues, pursuant to *Puchalski v 4212 28th St LLC*, 135 NYS3d 261 (Sup Ct Kings County 2020) and *Robinson v Goldman Sachs Headquarters, LLC*, 95 AD3d 1096 (2d Dept 2012), that although the additional statements regarding the lack of paint brushes, cans and rollers were made after the accident, the statements are contradictory and create an issue of fact in this case. Defendant also argues that this case is comparable to the facts in *Knight v Amman & Whitney, Inc.*, 222 AD3d 407 (1st Dept 2023) in which there was conflicting testimony regarding the height at which the plaintiff had performed the task. Here, plaintiff states he was painting while defendant argues plaintiff was not. Defendant argues that this conflicting account of the scene after the accident, in conjunction with the email between plaintiff and Rosenmiller, controverts plaintiff's account and calls into question his credibility. Defendant attempts to bolster this argument by citing *Smigielski v Teachers Ins. & Annuity Assn. of Am.*, 137 AD3d 676 (1st Dept 2016), wherein the plaintiff's testimony about falling from scaffolding while working on a ceiling was brought into question by a supervisor's conflicting testimony that his employer did not work on ceilings or with scaffolding, and that scaffolds were not present at the work site.

Defendant posits that these issues, and the question regarding whether plaintiff was performing an activity that falls under the protections of Labor Law § 240 (1), are material. Defendant argues that where facts are in dispute, and especially where the disputed facts are related to a material issue, a motion for summary judgment must be denied (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 320 [2004]).

Based on the testimony, it is undisputed that Rosenmiller did not witness the accident when it occurred. Moreover, it is undisputed that Rosenmiller did not observe the ladder or board pieces at the time of the accident, and that he only saw these items upon returning to the subject building after taking plaintiff to the hospital. Although defendant has proffered cases to show that the submission of post-accident evidence is sufficient to create an issue of fact, the cases presented are distinguishable from the one herein. Specifically, *Puchalski* and *Robinson* are distinguishable from the case at bar, as, in both cases, the plaintiffs themselves made the contradictory statements about what occurred at the time of the accident. There is no evidence that plaintiff here contradicted his own testimony as it relates to the accident. Similarly, in *Knight*, although there was conflicting testimony, the testimony given was from information gathered at the time of the accident. In all three cases, the conflicting testimony related to observations the witnesses made at the actual time of the accident. Here there is no conflicting evidence, as plaintiff was the sole witness to the accident.

Defendant's reliance on *Smigielski* is equally unavailing. Although Rosenmiller argues that to the best of his recollection the area had not been painted for a long while, and that he would have seen paint cans, rollers, brushes, and other painting accoutrement when he exited his apartment to assist plaintiff, these statements are based solely on speculation and not on any observations made at the time of the accident (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013] [defendant failed to raise an issue of fact by submitting affidavit of plaintiff's foreman who saw the accident scene shortly after the accident but did not witness it, and the affidavit was insufficient to raise an issue of fact despite contradicting plaintiff's account of the work he was doing at the time]; *Ortiz v Burke Ave. Realty, Inc.*, 126 AD3d 577, 578 [1st Dept 2015]). In addition, the accident occurred two landings above Rosenmiller's door, and plaintiff

testified that he placed most or all of the tools he used for painting on the top landing to the roof. Rosenmiller has not shown that he would have seen the items at the top landing when he opened his door. There is no evidence to raise an issue as to plaintiff's credibility regarding whether the accident occurred as alleged (contrast with *Smigielski*, 137 AD3d at 676 [as plaintiff himself provided inconsistent accounts of his accident, triable issues existed]; *see also Vargas v City of New York*, 59 AD3d 261, 261 [1st Dept 2009] [plaintiff's failure to seek medical attention for her alleged injuries until a week after the alleged accident raised an issue of fact as to whether the accident had occurred]). Moreover, there is no evidence to show that Rosenmiller made any observations of the scene of the accident until after he had returned from the hospital (*see Castillo v TRM Contr. 626, LLC*, 223 AD3d 458, 459 [1st Dept 2024] [finding that foreman's testimony which failed to specify whether he examined the room where the accident occurred or he had sufficient knowledge to determine whether the ladder could have fully opened during the performance of plaintiff's work was insufficient to overcome plaintiff's prima facie case]; *cf. Vargas v 1166 LLC*, 201 AD3d 614, 615 [1st Dept 2022] [field supervisor's testimony that he did not witness the accident itself but arrived at the scene as plaintiff was getting into the ambulance and "proceeded straightaway to the worksite" to find the subject guardrails present but unused was sufficient to raise an issue of fact]).

Based on the foregoing, defendant has failed to show that the testimony provided by plaintiff, the sole witness, is either inconsistent or contradicted by Rosenmiller's own account or by other evidence (*see Goreczny*, 110 AD3d at 466). Moreover, defendant has failed to provide any evidence from the time of the accident that contradicts plaintiff's account of the activity he was performing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Klein v City of New York*, 222 AD2d 351, 351 [1st Dept 1995], *aff'd* 89 NY2d 833 [1996];). As defendant has failed

to produce evidentiary proof in admissible form that is sufficient to establish the existence of material issues of fact which require a trial, plaintiff is entitled to summary judgment pursuant to CPLR 3212 in his favor on the Labor Law § 240 (1) claim against defendant.

The Labor Law § 241(6) Claim

Pursuant to the decision of this Court dated September 12, 2024 (NYSCEF Doc. No. 87) this portion of the motion has been withdrawn.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff Glenn Booth's motion pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim is granted as against defendant One Sixteen, Inc.; and it is further

ORDERED that the Labor Law § 241 (6) claim was permitted to be withdrawn pursuant to this Court's September 12, 2024 Order;

This constitutes the decision and order of this Court.

4/23/2025
DATE

SHLOMO S. HAGLER, 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