SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART** **36**

Justice

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INDEX NO. 154517/2019

JUAN DAVID QUINCENO PAREJA,
Plaintiff,

MOTION SEQ. NO. 002

- v -

60-74 GANSEVOORT, LLC and MJM ASSOCIATES CONSTRUCTION, INC.,
Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

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

The relevant facts in this case are detailed in the court's decision and order dated June 30, 2020 (NYSCEF Doc. No. 26, *decision and order*). In summary, plaintiff alleges that he was injured on April 10, 2019, while working as a carpenter for his former employer, Tri-Mar Industries, Inc. ("Tri-Mar"), a subcontractor at a construction site located at 74 Gansevoort, New York, NY (the "premises"). Defendant 60-74 Gansevoort, LLC ("Gansevoort") was the owner of the premises, and defendant MJM ASSOCIATES CONSTRUCTION ("MJM") was the general contractor at the construction project at the time of plaintiff's injury. Plaintiff asserts that he sustained injuries when he was struck in the head by a falling metal beam while holding a vertical jack in place, while his coworker, Jose Barragan (hereinafter, "Barragan"), stood on a 12-foot ladder disassembling and removing a horizontal metal beam as part of their construction work (NYSCEF Doc. No. 1, *summons and complaint*).

Plaintiff now moves, pursuant to CPLR 3212, for an order granting partial summary judgment to plaintiff as to liability against defendants on plaintiff's Labor Law § 240(1) cause of action for failure to secure a falling beam and failure to provide a protective device to protect him from the falling object. Plaintiff claims that he was involved in the disassembling of a deck, which included positioning jacks or posts and pouring concrete onto the deck to construct a floor. Plaintiff sets forth that on the date of the accident, he was involved with the assembly of the deck on the fifth floor of the building. He and Barragan went down to the fourth floor to bring missing materials up to the fifth floor that were to be used in assembling the deck. Plaintiff claims that while on the fourth floor standing on a concrete floor holding a vertical jack in place, Barragan stood on a ladder disassembling horizontal metal beams and ribs that were going to be moved to the fifth floor. In the process of disassembling the horizontal metal beams, a beam fell from above and struck plaintiff in the head.

Specifically, plaintiff argues that defendants failed to properly secure the metal beam that injured him to prevent it from falling and that no safety device was placed to prevent plaintiff from being struck by the metal beam. According to plaintiff, the only equipment that was

provided to him and Barragan to perform the aforesaid task was a 12-foot ladder, but the task being performed required safety equipment in the form of a scaffold or a truck with a lift, which were not provided to them (NYSCEF Doc. No. 48, *memo of law*). In support of his argument, plaintiff relies on portions of his deposition testimony as proof that he used a scaffold whenever he participated in the disassembling of a deck. However, plaintiff testified that no scaffold was provided to him on the date of his accident. He further testified that for safety reasons, the disassembling of a deck requires a minimum of three people, not two. Hence, he articulates that since only two people were involved in disassembling the deck instead of the required three or four, Barragan had to throw the disassembled parts to the floor as there was no extra person to receive and place the disassembled parts down safely. He further states that the 7-feet long, 10 inch thick, approximately 20-pound beam that injured him was dislodged after same was hit by another metal beam that was being moved. He also notes that he was wearing a hardhat, safety goggles, and construction gloves at the time of the injury (NYSCEF Doc. No. 44, *plaintiff deposition transcript*).

In opposition, defendants argue that since plaintiff and Barragan were engaged in disassembling the deck and bringing the pieces to another level to use there, it would have been contrary to that purpose to secure the beams. According to defendants, plaintiff's injury was not foreseeable given plaintiff's testimony that dismantling the beams was a common occurrence and that he had performed that same task at the premises before without incident. They posit that plaintiff has failed to submit expert testimony or evidence that the beams being removed needed proper securing. Defendants rely on the deposition testimony of MJM's supervisor and concrete safety manager, Franco Barone ("Barone"), who conducted weekly trainings regarding safety and hazard on the jobsite and maintained a daily log, as well as, the log for subcontractors to record their activities.

As to the cause of plaintiff's injury, Barone testified that, although he did not witness the accident, he completed the incident report by translating into English what plaintiff and Barragan told him in Spanish, to wit, that the beam slipped out of Barragan's hand and struck plaintiff. Barone also asserted that it was Tri-Mar's responsibility to provide safety materials such as scaffolding and ladders to its employees to engage in the deck disassembly and that he did not recall seeing any scaffolds, hoists, pulleys, nor a truck with a lift when he visited the accident site (NYSCEF Doc. No. 45, *Barone deposition testimony*). Defendants further note that there is no proof that the ladder that Barragan was using to dismantle the beams was inadequate for the job or otherwise defective, and photographs show that ropes, lanyard, and tape were all present at the jobsite (NYSCEF Doc. No. 60, *Exhibit B*). In addition, defendants argue that summary judgment should be denied because there are issues of fact as to how plaintiff's accident occurred — whether the beam slipped out of Barragan's hand or whether Barragan struck the beam with another item causing the beam to dislodge and fall (NYSCEF Doc. No. 58, *opposition*).

In reply, plaintiff maintains that the subject beam that fell and struck him was not the beam his co-worker removed. Rather, plaintiff relies on his own deposition testimony to argue that the beam that struck and injured him was dislodged when it was hit by the beam that his co-worker was trying to remove. According to plaintiff, since the beam that injured him was not being removed at the time it fell, securing it to prevent it from falling would not have been contrary to the purposes of the deck disassembling. In addition, plaintiff contends that, contrary

to defendants' assertions, there are no issues of fact as to how the accident occurred. According to plaintiff, the statements in the incident report attributed to him are hearsay because defendants failed to demonstrate that the statements therein were accurately translated by an objective and competent interpreter from Spanish to English. Furthermore, plaintiff posits that defendants fail to support their contention that ropes, lanyards and tape were available for plaintiff and his co-worker's use at the time of the accident. Plaintiff further asserts that, even were there evidentiary support for the proposition that the ropes, lanyards, and tape lying around the accident site could have been used to secure the decking, this still does not raise a question of fact to defeat plaintiff's motion, as plaintiff's failure to use such equipment would not establish him to be the sole proximate cause of the accident (NYSCEF Doc. No. 62, *reply*).

It is well-settled that the proponent of a motion for summary judgment 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

Labor Law § 240(1) analysis, the law, provides, as relevant here: "[a]ll 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) "imposes a nondelegable duty on owners and contractors to provide devices which shall be so constructed, placed and operated as to give proper protection to those individuals performing the work" (*Quiroz v Memorial Hosp. for Cancer and Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022] [internal quotation marks and citations omitted]). It "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]).

"Labor Law § 240(1) applies to both 'falling worker' and 'falling object' cases. With respect to falling objects, Labor Law § 240(1) applies where the falling of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned or secured" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267-68 [2001] [internal quotations and citations omitted]). "[F]alling object liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Constr. Co.*, 11 NY3d 757, 758-59 [2008]).

The absolute liability found within section 240 "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" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33

[2017] [internal quotation marks and citation omitted]). In addition, Labor Law § 240(1) must be liberally construed to accomplish the purpose for which it was framed (*Greenfield v Macherich Queens Ltd. P'ship*, 3 AD3d 429, 430 [1st Dept 2004]).

That said, not every worker who is injured 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]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007] [section 240 (1) "does not cover the type of ordinary and usual peril to which a worker is commonly exposed at a construction site"]). 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 v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Therefore, to prevail on a Labor Law § 240(1) claim, a plaintiff must establish that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

Here, plaintiff has established his initial *prima facie* entitlement to summary judgment by evincing through his deposition testimony that he was injured by a dislodged beam that was not in the process of being removed, and that there was no safety device placed between plaintiff and his co-worker that could prevent plaintiff from being injured by the falling beam (see *Torres-Quito v 1711 LLC*, ___ AD3d____,____, 2024 NY Slip Op 01279[U], *3 [1st Dept 2024]). Plaintiff testified that he lacked adequate protective devices necessary for disassembling the deck such as a scaffold or a truck with a lift. Also, plaintiff relies on Barone's testimony that plaintiff was injured by a beam after his co-worker unhooked a beam, to argue that Barone's description corroborates with his version of events that he was injured by a dislodged beam when his co-worker, Barragan, unhooked a perpendicular beam. Barone further corroborated plaintiff's testimony that adequate safety devices in the form of a scaffold or a truck with a lift were lacking as he did not see the safety devices when he visited the accident site (see *Bonaerge v Leighton House Condominium*, 134 AD3d 648, 649 [1st Dept 2015]).

As the burden shifts, defendants fail to adduce evidentiary proof to raise an issue of fact sufficient to preclude summary judgment. Defendants' reliance on the incident report, which Barone explained during his deposition was authored by him after translating into English what plaintiff and his co-worker described in Spanish as the cause of the injury, fails to raise an issue of fact. As an initial matter, the information contained in the incident report is hearsay as the translation should have been done by a competent and objective translator (see *Sanchez v 1 Burgess Rd., LLC*, 195 AD3d 531, 532 [1st Dept 2021]; *Nava-Juarez v Mosholu Fieldston Realty, LLC*, 167 AD3d 511, 512-13 [1st Dept 2018]). While hearsay evidence can be used in a motion for summary judgment, it cannot be the only evidence cited to raise an issue of fact (see *Fountain v Ferrara*, 118 AD3d 416, 416 [1st Dept 2014]). Defendants do not proffer any first-hand account to contradict plaintiff's account of how the accident occurred.

Next, defendants' contention that it would have been contrary to secure the beams since they were being disassembled by plaintiff and his co-worker is unavailing insofar as plaintiff testified that the beam that ultimately fell and injured him was not being removed at the time of

the accident (see *Bartley v 76 Eleventh Ave. Prop. Owner LLC*, — AD3d —, —, 2024 NY Slip Op 02087[U], *2 [1st Dept 2024]). Hence, the beam that fell should have been secured while the co-worker removed the pieces he intended to remove (see *Rutkowski v New York Convention Ctr. Dev. Corp.*, 146 AD3d 686, 686 [1st Dept 2017]). In addition, defendants' reliance on the unauthenticated photos (see *New York v Patterson*, 93 NY2d 80, 84 [1999]) attached to the incident report purportedly depicting ropes/straps at the premises, to argue that that plaintiff knew about the ropes and tape at the jobsite and that he and his co-worker were instructed to use them on the date of the accident is unpersuasive and not supported by any of the proof submitted (see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). In any case, "defendants' contentions would amount to, at most, comparative negligence, which is not a defense to a Labor Law § 240 (1) violation" (*Encarnacion v 3361 Third Ave. Hous. Dev. Fund Corp.*, 176 AD3d 627, 629 [1st Dept 2019]) as defendants have not provided any evidence to support a finding that plaintiff was a recalcitrant worker (see *Plaku v 1622 Van Buren LLC*, 198 AD3d 431, 432 [1st Dept 2021]). Given the foregoing, that branch of plaintiff's motion seeking partial summary judgment on his Labor Law 240(1) claim against defendants is granted. All remaining arguments and requests have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment against defendants on his Labor Law §240(1) claim is granted; and is it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of plaintiff, and against defendants; and is it further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants and Clerk of the Court; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of this court.

July 1, 2024

HON. VERNA L. SAUNDERS, JSC

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**