SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MILTON VERA,

Plaintiff,

- against -

THE 58 TO 64-40TH STREET CORPORATION, WIDGEON MANAGEMENT CORPORATION and RESOURCE CONSTRUCTION CORPORATION,

Defendants.

- x

THE 58 TO 64-40TH STREET CORPORATION,

Third-Party Plaintiff,

- against -

PARASKEVAS KOURIS PAINTING, INC.,

Third-Party Defendant.

- x

Index No.: 713086/2018

Motion Date: 7/28/22

Motion No.: 30

Motion Seq.: 2

The following electronically filed documents read on this motion by plaintiff for an order pursuant to CPLR 3212, granting plaintiff summary judgment pursuant to Labor Law § 240(1) against defendants THE 58 TO 64-40TH STREET CORPORATION (Corporation), and RESOURCE CONSTRUCTION CORPORATION (Resource) (collectively hereinafter defendants):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....EF	51 - 68
Resource's Affirmation in Opposition-Exhibits.....EF	73 - 81
Corporation's Affirmation in Opposition-Exhibits- Memo. of Law.....EF	83 - 106
Reply Affirmations.....EF	107 - 109

This is an action for damages for personal injuries allegedly sustained by plaintiff on July 16, 2018 while performing work on the 5th floor of a building located at 64 West 40th Street, in New York County, New York. Defendant Corporation is the owner of the subject building. Resource is the general contractor who contracted with plaintiff's employer, Paraskevas Kouris Painting (PK Painting) for plastering and painting work. Plaintiff alleges that he was injured when he fell from a Baker scaffold.

Plaintiff commenced this action by filing a summons and verified complaint on August 23, 2018. Defendant Corporation joined issue by service of an answer on November 14, 2018. Defendant Resource joined issue by service of an answer on December 11, 2018. This action has been discontinued as against Widgeon Management Corporation. Plaintiff now moves for summary judgment on his Labor Law § 240(1) claim.

At his examination before trial, plaintiff testified that at the time of the accident, he was employed by, and performing work for, PK Painting. Two Baker scaffolds were present on the 5th floor where he was working. One was red. The other was yellow. The two scaffolds were adjustable to approximately the same height. He was performing skim coating work to the ceiling of the 5th floor. The ceiling was anywhere from eight feet to eleven feet four inches high. He was working on the yellow Baker scaffold. He did not experience any issues with the scaffold at any time prior to the accident. The entire week before the accident, he used the yellow scaffold . To move the scaffold around the area he was working, he would have to get down off the scaffold onto the floor and push it. At the time of the accident, he had his compound bucket, plaster, and spatula on the scaffold. While standing on the scaffold, he all of a sudden started to feel the scaffold shake, which caused him to fall off and to the ground below. The scaffold tipped over and fell to the ground along with him. The scaffold wheels were locked.

Hogarth Arthur appeared for an examination before trial on behalf of Corporation and testified that the Corporation owned the building. The yellow scaffold was the Corporation's scaffold. The workers on the fifth floor never received permission to use the Corporation's scaffold. The scaffold did not have guardrails. The last time he used the scaffold was approximately four days before the subject accident. There were no issues with the scaffold. The scaffold was stable and in good condition.

Jeffrey Levitt appeared for an examination before trial on behalf of Resource and testified that PK Painting was hired by

Resource to perform painting and related work on the 5th floor of the building. Resource was the general contractor for the project pursuant to a contract with Corporation.

Non-party Paraskevas Kouris testified that he is the owner of PK Painting. Plaintiff was employed as a painter. PK Painting provided four ladders for use at the subject property. PK Painting also provided hard hats and harnesses to plaintiff. Plaintiff refused to use the safety devices. He told plaintiff that plaintiff must use the safety devices provided. He was not present at the time of the accident. The scaffold was not owned by PK Painting. He did not talk to plaintiff on the Monday morning of the accident. He talked to plaintiff on the Friday before the accident and told plaintiff to not use anything because there was no material. Prior to the accident, he never witnessed anyone use the scaffold on the 5th floor of the building.

Non-party Maria Kouris testified that she helped her father, Paraskevas Kouris, with insurance papers. She filled out the Workers' Compensation First Report of Injury Form, indicating that plaintiff tried to move the rolling scaffold while he was standing on it. The information was provided to her by her father.

Based on the evidence submitted, plaintiff contends that he is entitled to summary judgment since the Baker scaffold toppled over while he was standing on it. Additionally, plaintiff contends that since the scaffold lacked safety railings, he established his prima facie entitlement to judgment as a matter of law.

In opposition, Ismael Rivera, the freight elevator operator, submits an affidavit, affirming that in July 2018, construction work was ongoing. Part of his job responsibilities was to operate the freight elevator to transport materials, equipment and people, particularly contractors, working within the building up to the floor level where they were working. He also periodically monitored the work being performed. On a few occasions prior to the subject accident, he observed plaintiff working on a Baker scaffold. Plaintiff attempted to move the scaffold by himself while standing on the scaffold and using his body weight to shimmy the scaffold to a different location. He observed plaintiff laying on the floor after the accident, but did not observe how the scaffold tipped over.

The proponent of a summary judgment motion has the initial burden of submitting evidence in admissible form demonstrating

the absence of any triable issues of fact and establishing an entitlement to judgment as a matter of law (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Once the requisite showing has been made, the burden shifts to the opposing party to produce admissible evidence sufficient to establish the existence of a triable issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 [1993]). To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]). Although any purported contributory or comparative negligence of the plaintiff is not a defense in an action brought under the statute, a claim under Labor Law § 240(1) will not stand where the plaintiff's own conduct was the sole proximate cause of his or her injuries (see Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]; Plass v Solotoff, 5 AD3d 365 [2d Dept. 2004])

Here, plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1). Plaintiff submitted evidence demonstrating that while he was standing on the scaffold, it shook and moved, causing him and the scaffold to fall. Thus, plaintiff established that the scaffold failed to afford him proper protection and that this failure was a proximate cause of his injuries (see Campbell v 111 Chelsea Commerce, L.P., 80 AD3d 721 [2d Dept. 2011]; Moran v 200 Varick St. Assoc., LLC, 80 AD3d 581 [2d Dept. 2011]; Diaz v 5-01-5-17 48th Avenue, LLC, 111 AD3d 661 [2d Dept. 2013]). Plaintiff further established that the subject scaffold lacked safety rails on the sides (see Vasquez-Roldan v Two Little Red Hens, Ltd., 129 AD3d 828 [2d Dept. 2015]).

In opposition, defendants contend that plaintiff was the sole proximate cause of his injury as he was surfing the scaffold. However, it is undisputed that the subject scaffold lacked guardrails, which is a statutory violation, and that violation was a proximate cause of plaintiff's injuries (see Garzon v Viola, 124 AD3d 715 [2d Dept. 2015]). As such, even if

the injury is caused by a combination of the statutory violation and plaintiff's own actions, the recalcitrant worker and sole proximate cause defenses do not apply (see Moran v 200 Varick St. Assoc., LLC, 80 AD3d 581 [2d Dept. 2011][finding that plaintiff's intoxication was not the sole proximate cause where plaintiff fell from a scaffold that lacked railings] Kalisz v MJM Associates Const. LLC, 2020 WL 2114192 [Sup. Ct., New York Cnty. 2020]; Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280 [2003]). Moreover, since Mr. Rivera admitted that he did not witness the subject accident, Mr. Rivera's affidavit is based on mere speculation as to what plaintiff was doing at the time of the accident (see Stock v Otis El. Co., 52 AD3d 816 [2d Dept. 2018]).

Lastly, even though plaintiff's accident was unwitnessed, such does not preclude a granting of summary judgment in plaintiff's favor (see Begeal v Jackson, 197 AD3d 1418 [3d Dept. 2021]; Fox v H&M Hennes & Mauritz, L.P., 83 AD3d 889 [2d Dept. 2011]).

Accordingly, based upon the foregoing it is hereby,

ORDERED, that plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim is granted.

Dated: July 28, 2022
Long Island City, N.Y.

FILED
7/29/2022
COUNTY CLERK
QUEENS COUNTY

Robert J. McDonald
ROBERT J. MCDONALD
J.S.C.