SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

INDEX NO. 157583/2018

RAFAEL E. AZCONA,

Plaintiff,

MOTION SEQ. NO. 002

- v -

CENTER CONTINENTAL PROPERTIES, L.L.C., JAD THREE ASSOCIATES L.L.C, JSM MANAGEMENT CORP., and SNOWY ROSY LLC.,

Defendants.

DECISION + ORDER ON MOTION

----------X

SNOWY ROSY LLC,

Third-Party Plaintiff,

Third-Party
Index No. 595012/2019

-against-

BARMOR REHAB INC.,

Third-Party Defendant.

----------X

CENTER CONTINENTAL PROPERTIES, L.L.C., JAD THREE ASSOCIATES L.L.C, and JSM MANAGEMENT CORP.,

Second-Third Plaintiffs,

Second Third-Party
Index No. 595648/2019

-against-

BARMOR REHAB, INC.,

Second-Third Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 120

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

This is an action to recover damages for personal injuries allegedly sustained by a construction laborer on February 27, 2017, when, while working at a construction site located at 70-40 Austin Street, Queens, New York ("premises"), the ladder he was standing on broke through the surface it was set on, causing him and the ladder to fall partway to the floor below.

In Mot. Seq. 002, plaintiff Rafael E. Azcona moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law § 240(1) claim against defendants Center Continental Properties LLC ("Center"), JAD Three Associates, LLC ("JAD") and Snowy Rosy LLC ("Snowy").[1]

[1] By Stipulation of Discontinuance dated January 17, 2022, this action was discontinued as against defendant JSM Management Corp. (NYSCEF Doc. No. 88).

On the day of the accident, the premises was owned by JAD. Center was the master lessee and operator of the premises. JAD, through Center, leased two storefront units of the premises to Snowy. Snowy hired third-party defendant Barmor Rehab Inc. ("Barmor") to provide general contracting services for a project at the premises that entailed the renovation of Snowy's leased store fronts.

Plaintiff testified that on the day of the accident, he was employed by Barmor as a laborer (NYSCEF Doc. No. 91 at 26, *plaintiff's EBT*). He was hired the day before the accident to perform demolition work at the premises. He had two supervisors. One was a "Chinese woman" (*id.* at 43). He did not know her name. The other was a "Chinese man" (*id.* at 41). Plaintiff did not know his name either. The woman was the one who hired him. The man worked with him at the premises.

On the day of the accident, plaintiff, three coworkers, and the "Chinese man," were performing demolition work on the premises, a ground floor store (*id.* at 43). The demolition work involved the removal of walls and parts of the ceiling. His work sometimes involved using a ladder (*id.* at 46). The ladder was in good condition, had rubber footings and was clean (*id.* at 50).

Plaintiff testified that while demolishing a portion of the premises, "a water pipe burst" (*id.* at 51). Plaintiff "went to the back and [he] asked the Chinese man" what to do (*id.* at 52-53). Plaintiff further testified that the man then "came to the front, he took out a piece of plywood from the first floor" that was covering a hole in the floor, "and then he put a ladder there so that [plaintiff] could go downstairs to . . . shut the water off" (*id.* at 53, 56 ["The supervisor or manager put the ladder like this and I started to go down"]).

Plaintiff clarified that the piece of plywood on the floor was approximately six-feet long by four-feet wide (*id.* at 55) and was covering a hole in the floor. Plaintiff testified that "you could see down to the basement floor" when you looked in the hole with a flashlight (*id.* at 55 ["It looked like gray paint, what they paint the basements with"). Plaintiff believed that the ladder was set on the basement floor, but "that wasn't the basement" (*id.* at 56). Instead, it was "a floor that was made out of sheetrock" (*id.* at 57).

He further explained that the "Chinese man" "pointed with his finger for [plaintiff] to go down" into the hole (*id.* at 140). Plaintiff began to descend the ladder, when "all of a sudden the floor broke" (*id.* at 56) and "the ladder went through it," taking plaintiff with it (*id.* at 57-58). He and the ladder fell "[b]etween seven and a half to eight feet" (*id.* at 64). Plaintiff landed on top of a refrigerator located in the basement below the premises (*id.* at 66).

Plaintiff untangled himself from the ladder and climbed off the refrigerator. He then called an ambulance and went to the hospital.

At his deposition, plaintiff was shown a copy of his Workers' Compensation C-3 accident report (the C3 Report). He confirmed that he signed it (*id.*, at 139). He reviewed the C3 Report and testified that it was inaccurate in that it stated "I put the ladder" into the hole (*id.* at 139).

Plaintiff testified that he did not put the ladder in the hole, but rather, that the "Chinese man" did. He then testified that he was unsure as to who placed the ladder into the hole (*id.* at 141).

Greg Postyn testified that on the day of the accident, he was the vice president of Central, as well as, the managing agent and property manager of the premises. Central was the master lessee of the premises and "operate[d] the building" (NYSCEF Doc. No. 92 at 15, *Postyn EBT*). JAD owned the premises (*id.* at 20). Snowy was a tenant of Central, operating a retail store on the first floor of the premises. As a part of his work, Postyn would approve construction projects proposed by tenants (*id.* at 22). Two professional office tenants unrelated to the project were located in the basement below the premises (*id.* at 38). There was no way to access the basement offices from the worksite (*id.* at 39). Postyn learned of the accident shortly after it happened. He went to the premises and "learned that a sprinkler pipe had been discharged and there was a substantial amount of water damage . . . and that one of the workers had fallen through the floor" (*id.* at 42).

Postyn testified that, prior to the start of the project, he directed a Central employee to create a hole in the premises' floor (*id.* at 45). The hole allowed Central to investigate whether the floor could be lowered (*id.* at 46). After the hole was opened, a Central employee placed "plywood" over the hole and covered it with "two heavy bags of concrete" and "placed an orange safety cone on top of the plywood, as well" (*id.* at 51). As a part of its move-in renovation, Snowy would repair the hole (*id.* at 113). Postyn was not sure whether the hole plaintiff entered was the hole that Central created (*id.* at 46).

Snow Chuey testified that on the day of the accident, she was Snowy's CEO and sole officer. Snowy leased the premises and initiated the project. When Snowy took possession of the premises, there was a hole cut into the floor (NYSCEF Doc. No. 85 at 15, *Chuey EBT*). Part of the Project included renovating the floor, so Snowy's contractors would fill the hole (*id.* at 26).

On the day of the accident, Chuey received a telephone call from her contractor, Stephen Cheung, informing her of a "flood in the store" (*id.* at 31). She immediately went to the premises. When she arrived, Postyn was already present and the water was shut off (*id.* at 34). She then learned that plaintiff had fallen through the floor into the basement. She did not know why plaintiff was near or in the hole at the time of the accident, though she later learned from Cheung that plaintiff was looking for a water valve in the hole (*id.* at 38). Once the Project was completed, Cheung "disappeared" and Chuey was unable to locate or contact him (*id.* at 39). Chuey was aware that an entity named Barmor Rehab obtained permits for the project, but she did not know its connection to Cheung (*id.* at 55). Chuey was shown a copy of the contract for the project and confirmed that the contracting company was listed as Barmor Rehab, Inc. (*id.* at 66).

Defendants submit a copy of plaintiff's worker's compensation C-3 claim form (the C3 Report), dated May 9, 2017 – nine weeks after the accident. The C3 Report was typed. It indicates that the accident occurred as follows:

> "[Plaintiff] was doing demolition work in the ceiling when the pipe broke. [Plaintiff] ask[ed] the chinnesse [sic] guy where is the

> basement to close the water. Then he put out 1 plywood from the floor. [Plaintiff] put the ladder and [plaintiff] fell down" (NYSCEF Doc. No. 96).

"[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 the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, 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 (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240(1), 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) "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 & 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]).

"The statute is violated when the plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute and the defendant fails to provide a safety device adequate to protect the plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one" (*Jones v 414 Equities LLC*, 57 AD3d 65, 69 [1st Dept 2008]; *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017]). In addition, Labor Law § 240(1) "must be liberally construed to accomplish the purpose for which it was framed" (*Valensisi v Greens at Half Hollow, LLC*, 33 AD3d 693, 695 [2d Dept 2006] [internal citations omitted]). That said, not all workers injured at a construction site fall within the scope of protections of section 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]). 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" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

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 (see *Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]).

As an initial matter, plaintiff establishes that defendants, as the owner/manager and tenant responsible for the construction, are proper Labor Law defendants. Defendants raise no opposition to this issue.

Turning to the merits of the case, plaintiff establishes through his unrebutted testimony that, in an attempt to locate a water shutoff valve, his supervisor uncovered a hole in the floor and directed plaintiff to enter the hole via a ladder. It is also unrebutted that the ladder was placed on a surface that was insufficient to support the weight of the ladder, plus a worker. It is further unrebutted that when plaintiff began climbing down the ladder, the surface underneath the ladder collapsed, causing the ladder and plaintiff to fall to the basement below the work site.

Labor Law § 240(1) requires, not only that a safety device itself be sound and sufficient to protect from height related hazards, but also explicitly dictates that such devices "shall be so constructed, placed and operated as to give proper protection to a person so employed" (Labor Law § 240[1]; see *Bland v Manocherian*, 66 NY2d 452, 460 [approving a jury's findings that defendants "had not erected or placed the ladder from which plaintiff fell in such a manner, or with such safeguards, as necessary to provide plaintiff with proper protection"]; see also *Ross v 1510 Assoc. LLC,* 106 AD3d 471 [1st Dept 2013] [granting the plaintiff's motion for liability under section 240(1) where the ladder shifted "because of the unevenness of the floor" that it was placed upon]). Here, the ladder – which was set up on a fragile surface – was not placed in a manner that gave proper protection to plaintiff. Such failure directly led to – and therefore was a proximate cause of – the accident.

In opposition, defendants initially argue that questions of fact exist regarding whether plaintiff's accident was caused by his demolition work, or a separate issue unrelated to that work, such that section 240(1) would not apply. This argument is unpersuasive (see e.g., *Prats v Port Auth. of New York and New Jersey*, 100 NY2d 878, 882 [2003] ["it is neither pragmatic nor consistent with the spirit of the statute to isolate the moment of injury and ignore the general context of the work"]). Courts do not isolate the moment of a plaintiff's injury. Rather, they focus on the more general context of the work plaintiff performed (*id.*). To that end, courts have long held that workers injured on a construction site, even when not in the course of their explicit work, still fall within the scope of the Labor Law (see *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD 3d 431, 432 [1st Dept 2012]; *Hoyos v NY-1095 Ave. of the Americas, LLC*, 156 AD3d 491, 495 [1st Dept 2017]). Here, it is undisputed that plaintiff's attempt to locate the water shutoff valve arose directly from the demolition work at the premises that caused the leak

in the first instance. As such, plaintiff's work was directly related to that ongoing demolition work.

Next, defendants argue that there is a question of fact regarding how the accident occurred. Specifically, they argue that there is a credibility issue with plaintiff's deposition testimony. Plaintiff's testimony is that his supervisor set the ladder up in the hole, while his C3 Report statement reflects that he personally set up the ladder. Defendants' argument is unavailing.

"Where credible evidence reveals differing versions of the accident, one under which defendants would be liable and another under which they would not, questions of fact exist making summary judgment inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012]). Here, however, when read in a light most favorable to the non-movant defendants, this discrepancy does not raise a question of fact with respect to liability pursuant to Labor Law § 240(1), as under either version of the accident, section 240(1) was violated.

Specifically, plaintiff's uncontroverted testimony establishes that his supervisor directed him to enter the hole and further directed him to use the ladder to do so (*plaintiff's tr. at 52-53* [noting that he asked his supervisor what to do and, then his supervisor "came to the front, he took out a piece of plywood from the first floor"]; *id.* at 140 [the supervisor "pointed with his finger for [plaintiff] to go down" into the hole]). Defendants provide no evidence that plaintiff was not directed by his supervisor to enter the hole or use the ladder to do so, or that the ladder was placed on a stable surface (see e.g., *Bland*, 66 NY2d at 455). Accordingly, plaintiff's testimony establishes a violation of Labor Law § 240(1), regardless of whether plaintiff's supervisor placed the ladder in the hole or plaintiff personally placed the ladder in the hole at his supervisor's direction.

Therefore, plaintiff's purported improper placement of the ladder in a location that he was directed to set it up raises, at most, issues of comparative fault.[2] (See *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]).

Finally, defendants argue that there are questions of fact as to whether plaintiff was the sole proximate cause of the accident. This argument is also unavailing. "Under Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Therefore, if a violation of Labor Law § 240(1) is a proximate cause of an injury, the plaintiff cannot be solely to blame for it" (*Quiroz v Memorial Hosp. for Cancer & Allied Diseases*, 202 AD3d 601, 604 [1st Dept 2022]; quoting *Blake*, 1 NY3d at 290 [internal quotation marks and citations omitted]). Here, as discussed above, plaintiff has established that the subject ladder was not set up in a manner which afforded him sufficient protection, in violation of section 240(1). Accordingly, any negligence on his part cannot be the sole cause of the accident.

---

[2] Defendants' argument that plaintiff should have used external stairs to the basement is likewise unavailing. Testimony establishes that the basement was inaccessible from the premises, as the basement stairs were an exterior independent accessway for commercial office spaces unrelated to the Project (*Postyn tr at 38-39*). Further, there is also no testimony that plaintiff or his supervisor were aware of the existence of the stairs.

Given the foregoing, plaintiff is entitled to summary judgment in his favor on his Labor Law § 240(1) claim as against defendants. The parties remaining arguments were considered and found unpersuasive. For the foregoing reasons, it is hereby

ORDERED that the motion of plaintiff Rafael Azcona (Mot. Seq. 002), pursuant to CPLR 3212, for summary judgment in his favor as to liability on his Labor Law § 240(1) claim as against defendants Center Continental Properties LLC, JAD Three Associates, LLC, and Snowy Rosy, LLC is granted; and it is 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, as well as the Clerk of the Court, who shall enter judgment accordingly.

This constitutes the decision and order of the court.

November 7, 2024

HON. VERNA L. SAUNDERS, JSC

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**