

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

PAWEL GECA,

Plaintiff,

Index No.: 25669/04

- against -

Motion Date: 2/7/07

BEST ROOFING OF NEW JERSEY, INC.,

Motion No.: 10

Defendant.

- - - - - x

The following papers numbered 1 to 10 on this motion:

	<u>Papers Numbered</u>
Plaintiff's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s) & Memorandum of Law	1-5
Defendant's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	6-8
Plaintiff's Reply Affirmation-Exhibit(s)	9-10

By notice of motion, plaintiff seeks an order of the Court, pursuant to CPLR § 3212, granting him partial summary judgment on the issue of liability on plaintiff's first cause of action.

Defendant files an affirmation in opposition and plaintiff replies.

The underlying action is a claim by plaintiff for personal injuries he alleges he sustained as a result of an accident which occurred on July 21, 2004, at about 2:00 p.m., when he was working on the roof of the Hillcrest Elementary School in New City, N.Y. While engaged in the job of removing the existing roofing and replacing it with insulation and tar papers, plaintiff fell through a "skylight" hole in the roof that had been covered over with thin brown insulation. Plaintiff maintains that he had not been warned about the skylight areas

and they were not marked with warning cones or other devices. Plaintiff fell to the floor below. He was carried from the scene and eventually taken to Bellevue Hospital.

In response, defendant provides the affidavit of Bogdan Zedzian, a partner of Imperium Construction, the company that employed plaintiff. Mr. Zedzian claims he visited the job site daily, but he doesn't claim to have witnessed the accident. He claims that Imperium workers were warned to move to another side of the roof when the skylights were being removed, and that the openings left after removal were covered with 3/4 inch to 1 inch plywood.

Although Mr. Zedzian claims that plaintiff was given instruction not to go in the area of the skylight opening, he does not claim that he gave such instruction, nor does he name anyone who did give such instruction. Moreover, Mr. Zedzian makes only a generalized claim that he made "daily visits" to the work site, and not that he was actually at the work site on the day of the accident either before or after.

Consequently, plaintiff alleges that he is entitled to partial summary judgment on the issue of liability based on a theory of a violation of Labor Law § 240(1). Defendant maintains that there remain triable issues of fact with regard to plaintiff's claim.

As was recently expressed in Narducci v. Manhasset Bay Assoc, 96 NY2d 259, 267, 750 NE2d 1085, 727 NYS2d 37 (2001), "[n]ot every worker who falls at a construction site, and not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1). Rather, 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." "The hazard posed by working at an elevation is that in the absence of adequate safety devices (e.g. scaffolds, ladders) a worker might be injured in a fall." Id. at 268.

In Yeen, et al v. NWE Corp., _____ NYS2d _____, 2007 WL 466101 (NYAD2 Dep't) 2007, NY Slip Op. 01262, the Court concluded that plaintiffs had established a prima facie showing of entitlement to partial summary judgment on their Labor Law § 240(1) claim where plaintiffs were injured when the third floor and fifth floor that each respectively was standing on, collapsed under the weight of stacked cinder blocks. Id.

In opposition to plaintiffs' claim for partial summary

judgment, the defendants in Yeen submitted the affidavit of an expert who asserted that the alleged violation of labor Law § 240(1) was not the proximate cause of the accident. Rather, their expert opined it was the stacking of cinder blocks and not the absence of safety devices. Id.

In this instance, however, defendant submits only the hearsay statements contained in plaintiff worker's compensation claim. (i.e., "patient stated that while working on the roof, he slipped and fell") which even if it could be directly attributed to plaintiff, does not directly contradict plaintiff's claim that he fell through the improperly covered skylight hole. Defendant "suggests" that plaintiff may be deemed a "recalcitrant worker" because he failed to avoid the area where the skylights were open, as instructed, but provides no specific evidence that this plaintiff was warned and that he refused to heed such warning. (See, Moniusko v. Chatham Green, Inc., 24 AD3d 638, 808 NYS2d 696 (2d Dep't. 2005), "contrary to defendant's contention there was no evidence that plaintiff was recalcitrant in the sense that he deliberately refused to use the available safety harness.") Nor has defendant refuted plaintiff's claim that the hole where he fell was unmarked with a warning cone or other safety device.

Accordingly, under all of the foregoing, "plaintiff has established a prima facie entitlement to [partial summary] judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240(1)..." Boe v. Gammarati, 26 AD3d 351, 809 NYS2d 550 (2nd Dep't 2006). "In opposition the defendant failed to raise a triable issue of fact as to whether the injured plaintiff's own actions were the sole proximate cause of the accident." Id. at 352.

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that the motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendants on the issue of liability and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein.

Dated: Jamaica, New York
March 30, 2007

JOSEPH P. DORSA
J.S.C.