SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

TODD GABETTE,

Plaintiff,

- against-

NEW YORK UNIVERSITY, F.J. SCIAME CONSTRUCTION CO., INC., KING CONCRETE CUTTING & DRILLING, INC. and LONG ISLAND CONCRETE, INC.,

Defendants.

INDEX NO. 106695/07

MOTION SEQ. NO. 003

The following papers, numbered 1 to 5 were read on this motion by plaintiff for summary judgment pursuant to Labor Law § 240(1):

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

In this action, Todd Gabette (plaintiff), seeks to recover damages for personal injuries he allegedly sustained as a result of an accident that occurred in the course of his work at a construction and renovation site. Before the Court is a motion by the plaintiff for partial summary judgment on the issue of liability under Labor Law § 240(1). Defendants New York University (NYU) and F.J. Sciame Constuction Co., Inc. (F.J.) are in opposition to the motion, and defendant King Concrete Cutting & Drilling, Inc. (King Concrete) filed a partial opposition to plaintiff's motion. Discovery is complete and the Note of Issue has been filed.

BACKGROUND

On January 19, 2007, plaintiff, a construction worker, allegedly sustained serious injuries as a result of an accident which occurred during the course of his work during the renovation (project) of the seven-story NYU School of Philosophy building (building) located at 3-5 Washington Place in New York, New York. NYU is the owner of the site where the accident

occurred, and defendant F.J. was retained by NYU to be the construction manager at the project. King Concrete was retained by F.J. to cut three contiguous openings in the 4th, 5th and 6th floor slabs, approximately three feet by eighteen inches each, to allow for the installation of new ducts in the building. At the time of the accident plaintiff was employed as a steamfitter by Trystate, which subcontracted with F.J. to install/upgrade the HVAC system of the building. Trystates' work included installing risers in the basement of the premises and testing systems throughout the jobsite. Plaintiff avers that in order to properly test the systems the steamfitters had to open a valve located on the sixth floor, and in order to do so, on the day of the accident, plaintiff "went up a stairwell to the sixth floor which was a concrete floor with loose Styrofoam laying on the floor" (Notice of Motion ¶ 4; Plaintiff examination before trial (EBT) at exhibit 5). Plaintiff further stated that "the safety valve was about 10-12 feet away from the stairwell and he and his partner, Tommy Grivas (Grivas), made a right hand turn to approach the valve and they started to walk straight ahead. As plaintiff was walking he stepped on a piece of Styrofoam that cracked and gave way, causing plaintiff to fall thoughout [sic] the floor opening" (*id.*).

Plaintiff alleges that he sustained serious injuries from the fall; however plaintiff caught himself as his shoulders were going through the hole. Plaintiff states that the concrete slab opening was not properly protected nor was it designated by any barricades, cones, nettings or warnings and as a result plaintiff unknowingly stepped into the hole and fell. Subsequently on or about May 17, 2007, plaintiff commenced this action by Summons and Verified Complaint alleging violations of Labor Law §§ 200, 240(1), and 240(6). In support of his motion plaintiff submits, *inter alia*, a copy of the pleadings; EBT transcript of Scott Jones, F.J.'s employee and senior project manager; a copy of the contract between NYU and F.J.; the contract between F.J. and King Concrete; plaintiff's EBT transcript; Affidavit of Grivas, an employee of Trystate who walked to the sixth floor with plaintiff and witnessed the accident; and the accident report

documenting plaintiff's injury, signed by S.J.'s site supervisor Arthur Bowen (Bowen).

As a preliminary matter, even though plaintiff discusses Labor Law § 241(6) in his moving papers, F.J. and NYU proffer that plaintiff's motion should be limited by the relief requested in his notice of motion, wherein plaintiff seeks only summary judgment on his Labor Law § 240(1) claim. In opposition F.J. and NYU proffer that plaintiff's summary judgment motion should be denied because multiple issues of fact exist which preclude the granting of plaintiff's motion. Specifically, F.J. and NYU challenge plaintiff's injury and the manner in which plaintiff states the accident occurred. When the alleged accident occurred, King Concrete had two employees working on the fifth floor directly below the sixth floor opening. F.J. and NYU proffer that had the accident occurred the way plaintiff states, and he fell into the hole up to his armpits, the King Concrete employees would have seen the lower half of his body dangling above them. F.J. and NYU attach to their opposition papers the affidavits of Reynold Kahmann (Kahmann) and Eddy Manzuta (Manzuta), the two King Concrete employees who were present on the job site and allegedly witnessed the accident. Both Kahmann and Manzuta state that the only thing they saw fall through the sixth floor opening were dust and Styrofoam and at no point did they see any body parts dangling (Opposition, exhibits B and C). According to Kahmann, after the accident he did not see any tears or marks on plaintiff's clothing that would indicate he had fallen.

F.J. and NYU also question whether plaintiff could have even fit through the opening in the ground, as he is 5'11' and weighed 270 pounds when the accident occurred. F.J. and NYU also submit with their opposition an affidavit of biomechanical engineer Dr. Leon Kazarian (Dr. Kazarian) who reviewed plaintiff's deposition transcript, the bill of particulars, accident reports and medical reports. Dr. Kazarian states in his affidavit that to a reasonable engineering certainty the accident as described by plaintiff could not have produced the allleged shoulder injuries (Opposition, exhibit D). F.J. and NYU attach letters from a Dr. Herbert Sherry (Dr.

Sherry), an orthopedic surgeon, who examined plaintiff and reviewed the medical records and MRI studies, and said letters state to a reasonable medical certainty that the MRI studies of plaintiff's shoulders do not show any evidence of an acute injury (Opposition, exhibit E).

King Concrete asserts in its partial opposition that the herein motion should only be granted as against NYU and F.J. and not as against King Concrete, as it is neither the owner or the general contractor of the premises. As such King Concrete does not oppose the granting of plaintiff's summary judgment motion as against NYU and F.J.

In reply, plaintiff argues that the Kahmann and Manzuta affidavits are completely inconsistent with Mr. Kahmann's previous deposition testimony as well as signed admissions by the defendants, and as such they should be disregarded as they are tailored to raise a triable issue of fact. Plaintiff further states that the Kahmann and Manzuta affidavits are insufficient to raise *bona fide* triable issues of fact, and he is entitled to summary judgment on his Labor Law § 240(1) claim even if he did not completely fall through the floor. In support, plaintiff cites to various case law where the Court found Labor Law § 240(1) was applicable even where the plaintiff did not actually fall. Plaintiff avers that summary judgment should be granted in plaintiff's favor as the accident report, signed by F.J.'s site supervisor Arthur Bowen (Bowen), and the Grivas Affidavit are consistent with plaintiff's version of the accident and establish his entitlement to the relief requested herein.

STANDARDS OF LAW

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985];

CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Labor Law § 240(1)

Labor Law § 240(1), known as the "scaffold" law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). In enacting the statute, the Legislature "intended to place 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, rather than on the workers themselves" (*Stringer v Musacchia*, 11 NY3d 212, 216 [2008], quoting *Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 338 [2008]). The statute provides in pertinent part:

> 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]).

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff's actions were the sole proximate cause of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross*, 81 NY2d at 501). In *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], however, the Court of Appeals clarified that the dispositive inquiry does not depend upon whether the injury resulted from a "falling worker" or "falling object." According to *Runner*, "the governing rule is . . . that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder 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*'" (*id.*, quoting *Ross*, 81 NY2d at 501).

DISCUSSION

As a preliminary matter, the Court will only address the relief requested in plaintiff's Notice of Motion, as the Notice of Motion is controlling (*see* The Rules of the Justices, pgs. 34-35, http://www.nycourts.gov/supctmanh/UNIFRLrev-4-18-12.pdf).

The Court finds that plaintiff's fall into the unprotected hole in the sixth floor concrete slab, which was approximately three feet by eighteen inches, even though he fell partially through and caught himself at chest level, presents an elevated-related risk and plaintiff's injuries sustained in preventing himself from falling all the way through are compensable under Labor Law § 240(1) (*see Robertti v Powers Chang*, 227 AD2d 542, 543 [2d Dept 1996], citing *Limauro v City of N.Y. Dept. of Envtl. Protection*, 202 AD2d 170 [2d Dept 1994] ["[r]egardless of the height from which the plaintiff fell, the fall itself was allegedly caused by the inadequacy of the flooring which allegedly failed to provide the plaintiff the proper support and protection to which he was entitled"]; *c.f. Alvia v Teman Elec. Contracting, Inc.*, 287 AD2d 421 [2d Dept 2001] [Court found that where plaintiff's leg fell through a hole that was approximately twelve inches by sixteen inches was not large enough to pose an elevation related hazard enumerated in 204(1) were designed to apply]; *see Pesca v City of New York*, 298 AD2d 292, 293 [1st Dept 2002] ["Although plaintiff did not fall from the ramp, the injuries he allegedly sustained in preventing himself from falling may be compensable under Labor Law § 240(1) if shown to have resulted from a failure to provide a proper safety device in accordance with the requirements of that statute"]).

The Court concludes that plaintiff, through the evidence submitted in support of his motion, has established that NYU and F.J. violated Labor Law § 240(1) by failing to provide any safety devices to guard against the elevation-related risk that was posed by the improperly protected hole on the sixth floor into which he fell. As to King Concrete, plaintiff proffers no arguments in support of the entry of summary judgment in his favor on his Labor Law § 240(1)

claims, and as such the portion of plaintiff's motion for summary judgment as against King Concrete is denied.

In plaintiff's EBT he testified that after climbing the stairs to the sixth floor there was nothing on the floor but concrete, construction dust, and pieces of Styrofoam all over that were flush with the floor (Notice of Motion, exhibit 5, pgs. 34-37). He further testifies that there was nothing to indicate that the Styrofoam pieces were covering holes in the concrete slabs (*id.*). The Grivas Affidavit further corroborates plaintiff's version of the accident. Also, the accident report, signed by an F.J. employee, states that plaintiff stepped and fell into "[a] concrete slab opening that was inadequately protected" (Notice of Motion, exhibit 6). Further, Jones testified in his EBT that he does not remember whether the holes in the concrete slabs were covered with plywood on the date of accident, however he states that it would have been either F.J.'s or a carpentry subcontractor's responsibility to do so (Notice of Motion, exhibit 2, pg. 71). Jones further testified that "either plywood nailed over the hole or a guardrail around the opening" would have been an adequate precaution or safety measure (*id.* at pg. 70). The Court notes that in their opposition to plaintiff's motion; NYU and F.J. do not deny that there was no safety equipment like a rope, barricade, or plywood; warning of the hole in the concrete floor or properly covering it prior to the accident; nor was there any guard rail or safety railing on the sides.

Regarding the issue of proximate causation, plaintiff alleges that his injuries were caused solely by his falling into the improperly protected hole on the sixth floor (*see* Notice of Motion, Affirmation in Support, ¶¶ 4-10; exhibit 5, pgs. 34-38). However defendants contest this and argue that plaintiff did not fall through the hole in the sixth floor cement slab because the King Concrete workers on the fifth floor did not see his body dangling, and on the basis that he was too heavy to fit through the opening in the concrete slab. The Court finds these arguments to be unavailing. Moreover, the Kazarian Affidavit and the letters from Dr. Sherry, which were

attached to NYU and F.J.'s opposition, have no bearing on the herein motion and instead go toward plaintiff's damages, which are to be determined at trial. Accordingly, the Court finds that plaintiff is entitled to partial summary judgment, on the issue of liability only, on his cause of action against NYU and F.J. for violation of Labor Law § 240(1).

CONCLUSION

Accordingly, it is,

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted as against NYU and F.J. only; and it is further;

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties, and the Clerk of the Court who is directed to enter judgment accordingly, within 30 days of entry.

This constitutes the Decision and Order of the Court.

Dated: 4-17-12 **Enter:**

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ; ☐ DO NOT POST ☐ REFERENCE