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

PRESENT: Stanley S. Kolen PART 29

0400524/2003

SYMONDS, THEODORE
VS
1114 AVENUE OF THE AMERICAS,

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 2

PARTIAL SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/8/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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THEODORE SYMONDS and KAREN SYMONDS,

Plaintiffs,

-against-

Index No. 400524/03

1114 AVENUE OF THE AMERICAS, LLC, TRIZECHAHN-SWIG, LLC, STRUCTURE TONE, INC., INTERNATIONAL CENTER OF PHOTOGRAPHY, NEW YORK CITY HEALTH AND HOSPITALS CORP., BELLEVUE HOSPITAL, JUAN GRAU, AMY CHUANG, ALBERT EINSTEIN HOSPITAL, MONTEFIORE MEDICAL CENTER, INGRID KATHERINE MUDGE,

Defendants.

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INTERNATIONAL CENTER OF PHOTOGRAPHY, 1114 AVENUE OF THE AMERICAS, LLC, TRIZECHAHN-SWIG, LLC,

Third-Party Plaintiffs,

-against-

PENGUIN AIR CONDITIONING CORP. and PENAVA MECHANICAL CORP.,

Third-Party Defendants.

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Stanley L. Sklar, J.:

In this personal injury action, plaintiffs move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability, pursuant to Labor Law § 240 (1), against 1114 Avenue of the Americas, LLC (Avenue), Trizechahn-Swig, LLC (TS), Structure Tone, Inc. (ST), and International Center of Photography (ICP).

On April 23, 2001, plaintiff Theodore Symonds (plaintiff), a steam fitter/welder and member of the Plumbers and Pipefitters Local 630 union, who was employed by third-party defendant Penava Mechanical Corp. (Penava), was working in the basement of premises located at 1114 Avenue of the Americas, New York, New York. Avenue was the owner of the premises; TS was the owner's agent; and ICP was the tenant of the demised premises that were being renovated at the time of plaintiff's accident. ICP retained ST as the general contractor/construction manager for the project; ST subcontracted with third-party defendant Penguin Air Conditioning Corp. (Penguin)against which plaintiffs commenced a separate action; and Penguin subcontracted with Penava, plaintiff's employer.

At sometime after 2:00 P.M. that day he was standing on a 10-foot, wooden, A-frame ladder, welding pipes near the ceiling, when he fell and was injured. There were no witnesses to the incident. See Weerth aff. ¶ 16 An ambulance arrived at about 2:30 P.M. and took plaintiff to Bellevue Hospital operated by codefendant New York City Health and Hospitals Corporation, where he arrived at about 2:50 P.M.

At his November 12, 2003 deposition plaintiff testified that he arrived at the job site at 7:00 A.M. and was provided by Penava with a 10-foot A-frame ladder to reach a pipe that he was to weld. The ladder had "no rubber, like feet on it" (EBT, p

149), but it had two horizontal braces which were fully extended. The floor on which the ladder was positioned was concrete and apparently fairly level (Id, p 39). The rungs of the ladder were wood and there was nothing unusual about the ladder which caught plaintiff's attention when he went up and down the ladder (Id 40), which he said had occurred about 20 times that day before the accident (Id 40). Plaintiff believed at the time of the accident, which occurred after his lunch break, that he was on the third rung from the top of the ladder(Id 44), about 6-8 feet from the ground (Id 151), and that "[t]he ladder slipped and wobbled a little bit and [he] lost [his] balance". Id 51 He further testified that "[i]t felt like it twisted" [Ibid] and that it moved "[f]rom side to side"(Id 52). The ladder was not secured to any part of the building. Id 63

At his deposition plaintiff was asked if he had consumed any alcoholic beverages from the time he started work on the day in issue until the accident and he replied, "I don't remember having anything", nor did he recall what he had eaten for lunch or whether he had a beverage with lunch. Id 152 He was further asked whether before the accident he had ever suffered from dizzy spells, and responded, "No". Id 153

Not all of the parties participated in plaintiff's deposition since the third-party action was instituted after plaintiff's deposition was held. Thus neither Penguin nor Penava

had the chance to depose plaintiff before this motion was made even though at least Penava before this motion was served demanded that plaintiff be produced for deposition (See Kelly aff. in opp. Exh C). In addition plaintiffs' supplemental summons and complaint which added ICP as a party defendant was filed on or about December 4, 2003, i.e. after plaintiff was deposed; thus ICP never had the chance to depose plaintiff. It appears that at this point in the litigation only plaintiff has been deposed.

After plaintiff was deposed (See Weerth aff. in opp. ¶4) defendants received medical records relating to plaintiff, one of which related to an emergency room visit to a hospital in North Carolina, where plaintiff had a home. That visit took place on December 20, 2000, about four months before plaintiff's fall from the ladder. According to that record plaintiff was complaining of a few episodes of weakness during which he turned gray and felt weak. This was accompanied by a dizzy sensation but no loss of consciousness which all resolved in about 15 minutes. See Kelly aff. in opp. Exh E. Under his social history it was noted that plaintiff drank 6-8 alcoholic drinks per day. He was diagnosed with pre-syncope and alcohol abuse, and a differential diagnosis included "[h]ypoglycemia or metabolic problems related to alcoholism or fatigue". Ibid On October 15, 2001, about 6 months after plaintiff fell from the ladder,

his wife, the coplaintiff in this action, complained to that hospital about the diagnosis of alcohol abuse. See Kelly aff. in opp., Exh I

After plaintiff's deposition defendants also received the records from Bellevue Hospital where plaintiff was brought immediately after his fall. In that record plaintiff gave a social history of drinking 2 beers a day. A 2:50 P.M. note of April 23 indicates that plaintiff had no "recall of event", that he was awake on scene and stated "I am okay". See, Kelly aff. in opp. Exh E See also Ambulance report. Id, exh J At 3:09 P.M. that day blood for an ethyl alcohol level was collected which resulted in a serum value at 3:44 P.M. of 105 mg/dl. Id, exh K A urology consult note recites that the patient was "unsure at how he fell", that the patient had ⊕ AOB (alcohol on breath), and that the patient reported having had 'a couple of beers' with lunch". The urologist's plan recommended a cystogram "because of mechanism and intoxication". See Kelly aff. in opp., exh D Another note of the same date also indicates that the patient "does not recall accident". Id exh F A "TRACC Note" recites that the patient "[d]oes not remember the accident ... vaguely remembers being in a blue ambulance ... under influence of alcohol". That note further recites "[p]ossible loss of consciousness" with the word possible stricken.

Although plaintiffs' amended complaint, as alleged

against the non-medical defendants (Avenue, TS, ST, and ICP), asserts causes of action sounding in negligence, and violations of Labor Law §§ 200, 240, and 241, this motion seeks partial summary judgment solely on the issue of these defendants' liability under Labor Law § 240 (1) which provides

> [a]ll contractors and owners and their agents; except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.

Plaintiffs' counsel asserts in his moving affirmation that these defendants are liable under the Labor Law because the ladder did not have rubber footings or any non-skid devices to ensure proper stability, that plaintiff was not provided with safety equipment to secure the ladder, safety lines or a harness and was not provided with a partner to hold or stabilize the ladder as he stood on it and that when the ladder moved plaintiff lost his balance and fell sustaining fractures to his head, wrist, hand, ribs, elbow, pelvis and leg as well as a renal laceration and a meniscal tear.

In opposition* defendants and third-party defendants,

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* The HHC defendants take no position on this motion.

especially those who never had a chance to depose plaintiff, as well as those who never had a chance to depose him after receipt of his medical records, assert that this motion is premature. In addition the motion is opposed because there were no witnesses to the accident. Also, there is a claim of a significant issue as to the plaintiff's credibility with respect to how the accident happened based on the discrepancies between what he told Bellevue's personnel and what he testified to at his much later deposition. Further defendants note that there is a discrepancy between plaintiff's deposition testimony that he never suffered from dizziness and the North Carolina hospital's record from four months before the accident indicating that plaintiff was having dizzy spells. Defendants also rely on the evidence pointing to plaintiff's drinking immediately before the accident, his history of drinking as derived from the hospital records and his claimed lack of recollection at his deposition as to whether he drank on the day in issue, which he did seem to remember in speaking to Bellevue's personnel.

Defendant Penava, upon whose opposition papers the other opponents of this motion rely, also provides the affidavit of its toxicologist, Jesse Bidanset, Ph.D regarding the results of Bellevue's alcohol analysis. Dr. Bidanset, after adjusting the serum value of 105 mg/dl to its whole blood equivalent of 89 mg/dl and after making several assumptions about when the

drinking started and ended and plaintiff's weight, concludes that plaintiff had to have consumed more than 3.0 ounces of pure ethanol, i.e. the equivalent of more than six standard size drinks, a drink being defined as a 12 once portion of domestic beer, 5-6 ounces of wine or $1^{1/4}$ ounces of 80 proof liquor. Dr. Bidanset then, making the assumption that plaintiff ate a heavy lunch, concludes that plaintiff's blood alcohol level was greater than .07% at the time of his fall. Plaintiff, who did not remember at his deposition what he had eaten for lunch, claims for the first time in his reply papers to have eaten a sandwich and two beers. He also claims for the first time in his reply papers (to which the defendants had no opportunity to respond) that he took only a 30 minute lunch break which began "shortly after" noon. Dr. Bidanset asserts that a blood alcohol concentration (BAC) of .07-0.8 % "can" produce a significant degree of impairment of central nervous system function. He then opines to a reasonable degree of toxilogical certainty that the effects of such a BAC include a difficulty in seeing clearly, uninhibited behavior willing to take risks with disregard for personal safety, deficits in balance and coordination which "would" contribute to this accident, slowed reflexes and cognitive response and impaired judgment. Dr. Bidanset states that this concentration of ethanol "would" produce central nervous system depression. Dr. Bidanset further maintains that

the entries in Bellevue's chart, e.g. "under influence of alcohol", support his conclusion. Dr. Bidanset concludes that plaintiff was intoxicated at the time of his accident. Those opposing plaintiffs' motion claim that it must be denied since there is an issue as to whether plaintiff's intoxication was the sole proximate cause of his accident.

Penava also provides the affidavit of a person who was employed by it at the job site on the day in issue. That individual stated that he had inspected the ladder, which was brand new, immediately after the accident, that it was fine, that there was nothing wrong with it and that it was put back into service.

Penava then provides the affidavit of its safety expert, Howard Edelson, who purports to be familiar with OSHA, and State and City codes, who opines that the A-frame ladder with the horizontal braces fully extended was the appropriate and proper safety device to be used by plaintiff for the job he was performing at the time of the accident. Edelson notes that plaintiff testified that he was standing on the third rung from the top at a height of about six to eight feet off the ground and had gone up and down that ladder about 20 times on the day in issue before the accident occurred. Edelson opines that since plaintiff was working from the seventh step of a 10-foot ladder there was no requirement for anyone to steady it or for the

ladder to be secured against sway. He points to section 23-1.21 (e)(3) of the New York State Industrial Code which recites that the ladder shall be used only on firm level footings and that if work is being performed from a step 10 or more feet above the footing the ladder shall be steadied by a person or secured mechanically against sway. Edelson asserts that since plaintiff was only working from the seventh step of the ladder this section did not apply. He further notes that the ladder was resting on a level concrete floor. Edelson maintains that rubber safety feet are not required for an A-frame step ladder, that they are only used on straight and extension ladders. Finally Edelson claims that plaintiffs' reliance on 23-1.16 of the Industrial Code is misplaced since safety belts, harnesses, tail lines and lifelines are not required on an A-frame step ladder where the plaintiff is working from the seventh step. Thus those opposing the motion maintain that plaintiff was provided with the appropriate safety device to be used for the work he was performing.

In reply plaintiffs rely on the affidavit of their expert pharmacologist, John Wurpel, Ph. D, who while agreeing that plaintiff's blood alcohol level when the blood was drawn was .089, asserts that plaintiff was not intoxicated and that plaintiff's height and weight and claim that he had eaten a sandwich and had drunk two beers would lead to a BAC of .089. Dr. Wurpel also maintains that plaintiff had an increased

behavioral and pharmacokinetic tolerance to alcohol based on his social history of drinking about 2 beers a day. Dr. Wurpel asserts that plaintiff was neither legally nor clinically intoxicated on the day of the fall and demonstrated no indications of intoxication. Dr. Wurpel claims that Dr. Bidanset's conclusions are speculative and contraindicated by plaintiff's testimony. Plaintiffs also rely on plaintiff's affidavit submitted with his reply papers of November 9, 2004 in which he asserts in essence that he was not impaired in any manner and had no difficulty maintaining his balance or coordination.

Finally plaintiffs in their reply papers rely on the affidavit of Walter Konon a civil and environmental engineer who asserts that based on the nature of the work performed by plaintiff on the day in issue which required him to lean over and based on the fact that plaintiff wore a welders hood that limited his vision, he should have been given a ladder with non-skid treads which should have been braced by either someone holding it or by mechanical means. Konon further opines that the nature of the work would have caused the ladder to twist, slip and wobble and that he should have been using a scaffold to do the work. Konon also states that allowing plaintiff to perform welding duties while using a ladder rather than a scaffold violated 12 NYCRR 23-1.25(d) which provides that "where necessary" welders

shall be provided "with proper scaffolds", and that allowing him to use a wooden A-frame ladder on a concrete floor violated 12 NYCRR 23-1.21 (b)(4)(ii), which provides that "[a]ll ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings", and CFR 1926.1053 (b)(7), which provides that ladders "shall not be used on slippery surfaces unless secured or provided with slip-resistant feet", and defines slippery surfaces as including "concrete surfaces that are constructed so they cannot be prevented from becoming slippery". There is no evidence presented here as to whether the concrete floor in issue was constructed so that it could not be prevented from becoming slippery. Konan also states that defendants violated ANSI 14.1-1982 8.3.4 which provides that a "ladder base shall be placed with a secure footing on a firm, level support surface", that shoes shall be installed "where required for slip resistance and that [l]adders shall not be used on ... slippery surfaces unless suitable means to prevent slipping are employed". Konan does not specifically state the concrete floor in issue was slippery.

Plaintiffs' motion is denied. Not every fall from a ladder gives rise to liability under Labor Law § 240(1) *Blake v. Neighborhood Hous.*, 1 NY3d 280, 288; *Caster v. Cortland Housing Authority*, 266 AD2d 619 (3rd Dept, 1999), lv. to app. den. 94 NY2d 761 Nor does every fall from a ladder which results in

injury warrant the granting of summary judgment to a plaintiff. See *Costello v. Hapco Realty, Inc.*, 305 AD2d 445 (2nd Dept, 2003); *Tate v. Clancy-Cullen Storage*, 171 AD2d 292 (1st Dept, 1991); *Selja v. American Home Products Corp.*, 307 AD2d 840 (1st Dept, 2003)

To establish entitlement to summary judgment a plaintiff must prove that Labor Law § 240 (1) was violated and that such violation proximately caused injury. *Blake*, supra at 289; *Boguszewski v. Solo Salon and Spa*, 309 AD2d 777 (2d Dept, 777) Once this burden is met contributory negligence is not a defense. *Blake*, supra at 289 However if a defendant demonstrates that a plaintiff's accident was proximately caused solely by his own actions plaintiff is not entitled to judgment in his favor. *Blake* supra; *Boguszewski*, supra In addition where there are issues of fact as to how an accident occurred summary judgment is inappropriate. Ibid; *Chan v. Bed Bath & Beyond*, 284 AD2d 290 (2nd Dept, 2001); *Selja*, supra; *Costello*, supra

The papers here raise an issue as to plaintiff's credibility and thus as to how the accident occurred. Bellevue's records indicate that plaintiff told at least four medical personnel that he was unsure how he fell and/or that he did not recall the accident. Yet at that same time plaintiff was able to remember the color of the ambulance, give his medical history and

give his account of what he claims he drank before the accident. At his deposition years later plaintiff was able to recall the incident. This unexplained discrepancy [See, *Silva v. 81st Street & Avenue A Copr.*, 169 AD2d 402, 404 (1st Dept, 1991); lv. to app. den. 77 NY2d 810] raises an issue as to how the accident happened and as to whether in fact the ladder moved, twisted and slipped and thus caused plaintiff's fall, especially here where plaintiff was the only witness to the accident. See, *Muhammad v. George Hyman Construction*, 216 AD2d 206 (1st Dept, 1995); *Maldonado v. Townsend Ave. Enterprises, Ltd.*, 294 AD2d 207 (1st Dept, 2002); *Boguszewski supra; Castronovo v. Doe*, 274 AD2d 442 (2nd Dept, 2000); *Barber v. Roger P. Kennedy General Contractors, Inc.*, 302 AD2d 718 (3rd Dept, 2003); *Salotti v. Wellco*, 273 AD2d 862 (4th Dept, 2000); *Cunneen v. Square Plus Operating Corp.*, 249 AD2d 258 (2nd Dept, 1998); Becovic v. Scoria & Diana Associates, Inc., 12 AD3d 388 (2nd Dept, 2004)

Further the evidence submitted raises issues to whether plaintiff was intoxicated and whether such any such intoxication was the sole proximate cause of plaintiff's fall and ensuing injuries. *Bondanilla v. Rosenfeld*, 298 AD2d 941 (4th Dept, 2002); See generally *Kijak v. 330 Madison Avenue Corp.*, 251 AD2d 152, 154 (1st Dept, 1998); *Tate v. Clancy-Cullen Storage Co., Inc.*, supra at 296-297

Specifically the North Carolina hospital's records from

four months before this accident indicate that plaintiff presented with a social history of drinking six to eight alcoholic drinks daily and set forth a diagnoses of alcohol abuse. Also plaintiff's BAC on the day of his accident was elevated to the point where Penava's expert concluded that plaintiff was intoxicated which such expert stated would among other things affect plaintiff's balance. Not only did the opinion that plaintiff was intoxicated come from Penava's expert, it also came from those who treated him at Bellevue, namely, the urologist who wrote "intoxication" and who also in taking plaintiff's history directly from plaintiff put only the words "couple of beers" in quotes, presumably to indicate on the record that the doctor did not necessarily believe plaintiff, and the individual who wrote under "TRACC Note" "under influence of alcohol". As previously indicated plaintiff could not recall at his deposition whether he had had any alcoholic beverages on the day in issue prior to his fall, although he told Bellevue personnel that he had been drinking, thereby shedding further doubt on plaintiff's credibility. That plaintiff may not have been legally drunk under the statutes that deal with driving, boating or hunting, none of which activities is relevant here, does not mean that he was not clinically drunk.

I further note that plaintiff had been having dizzy spells four months before the accident and denied that at his

deposition. Whether such dizzy spells may have been a factor in the fall has not been explored by the opponents of this motion since they only learned of such spells after plaintiff's deposition and have not had a chance to depose him in that respect or have an IME performed. Moreover some of the opponents of this motion have not yet had any chance to depose plaintiff, and it may be that the defendants will want to depose medical personnel who treated him at the North Carolina hospital and Bellevue.

In view of the foregoing the motion is denied.

Settle order.

Dated: April 8, 2005
60 Centre St.
New York, NY

J.S.C.