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

PRESENT: HON. PAUL WOOTEN Justice PART 7

SELWYN ADAMS and SHAHEEN ADAMS,

Plaintiffs,

- against-

GLENMAN CONSTRUCTION CORPORATION and GLENMAN INDUSTRIAL & COMMERCIAL CONTRACTOR, CORP.,

Defendants.

INDEX NO. 110729/2007

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by plaintiff Selwyn Adams for summary judgment under Labor Law § 240(1).

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

Cross-Motion: ☐ Yes ■ No

This is a personal injury action by plaintiff Selwyn Adams ("plaintiff") and his wife Shaleen Adams (collectively "plaintiffs") to recover damages for injuries allegedly sustained while plaintiff was working as an ornamental ironworker on a renovation project at the Levin Institute. The accident occurred when a hoisting apparatus that was being used to lower a steel beam allowed the beam to fall and strike plaintiff. Plaintiff commenced this action against defendants Glenman Construction Corporation ("Glenman Construction") and Glenman Industrial & Commercial Contractor Corp. ("Glenman Industrial") (collectively "defendants" or "Glenman"), asserting claims under Labor Law §§ 200, 240(1) and 241(6), OSHA, and for

common law negligence.[1] Plaintiff's wife brought a derivative claim for loss of services. The parties have completed discovery and the Note of Issue was filed on May 15, 2009. Plaintiff now moves for summary judgment, pursuant to CPLR 3212, awarding judgment in his favor on the Labor Law § 240(1) claim on the issue of liability. Defendants have responded in opposition to the motion, and plaintiff has filed a reply.

BACKGROUND

In support of his summary judgment motion, plaintiff submits, *inter alia*, his own deposition; a deposition of Thomas Conneally ("Conneally"); an affidavit of Phillip David ("David"); the contract between Glenman Industrial and the State University Construction Fund ("the State Fund"); an accident report by Michael Zangoglia ("Zangoglia") dated October 10, 2006; a Workers' Compensation report dated October 11, 2006; and photographs. In opposition, defendants submit an affidavit by Antonio Zegarelli ("Zegarelli") with an attached accident report dated October 11, 2006; and an unexecuted stipulation requesting defendants to dismiss all claims against Glenman Construction. The undisputed facts are as follows.

Glenman was retained by the State Fund to perform interior renovation work at the Levin Institute at 120 East 55th Street, New York, New York. Their agreement was memorialized in a written contract executed between Glenman Industrial and the State Fund on January 25, 2006. Conneally, the President of Glenman Construction, signed the contract on behalf of Glenman Industrial.[2]

Glenman subsequently hired other contractors to perform work at the job site, including

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[1]Plaintiffs initially commenced an action against Glenman Construction and subsequently filed a second lawsuit against Glenman Industries. The two actions were ordered consolidated on December 2, 2009.

[2]Although the contract was executed by Glenman Industrial, Conneally also testified at his deposition that Glenman Construction was hired to perform the work for the State Fund (*see* Conneally deposition at 8-10). Conneally does not clarify the respective roles of the two companies and refers to them collectively as "Glenman."

subcontracting with Model Iron Works Inc. to install a catwalk. Model Iron Works, in turn, hired plaintiff to work as an ornamental ironworker on the catwalk.

According to plaintiff's deposition, on October 10, 2006, plaintiff and his co-worker, David, were working at the site on a catwalk that was being built on the second floor. At around 11:30 a.m., plaintiff's foreman, Zegarelli, ordered plaintiff to remove a 1,300 pound steel I-beam from the catwalk. Plaintiff was provided with a hoisting apparatus known as a "roustabout," which was a type of mobile crane. The beam was attached to the roustabout with a choker that went around the center of the beam. Plaintiff was standing on a wooden A-frame ladder to help guide the beam to the ground below, and no one was standing on the other end of the beam. While plaintiff was on the ladder holding the beam with both hands, Zegarelli began operating the roustabout. For an unknown, the roustabout gave way and the beam free fell and hit plaintiff in his chest. Plaintiff was allegedly thrown off the ladder to the ground. After the beam came in contact with plaintiff's chest, it purportedly fell and went through the ladder splitting it in half. Plaintiff recalled that there had been previous problems with the roustabout's safety mechanism not working properly.

David witnessed the accident and stated in his affidavit that the catwalk was located at the cellar level, and that David was on one end of the beam and plaintiff was on the other end as it was being removed. As Zegarelli started to lower the beam with the roustabout, David observed that the safety let go and the beam dropped about four feet and hit plaintiff "off the ladder." Plaintiff fell onto the floor and the beam shattered the ladder. Plaintiff had a mark on his chest area from where he was hit. David and plaintiff were not provided with fall protection or harnesses.

Zangoglia, Glenman Construction's site supervisor, prepared an accident report on October 10, 2006. He reported that plaintiff was standing on a ladder and that the beam lowered and struck plaintiff in the-mid torso area knocking him to the floor. He noted that the

incident was due to an apparent lift malfunction.

Zegarelli, however, prepared an accident report on behalf of Model Iron Works and reported that plaintiff was not knocked off the ladder when the beam hit him. Zegarelli described the incident as follows:

> "Upon lowering the tube with the roustabout the tube fell to the floor, it sheared the rear horizontal components of the ladder, upon which [plaintiff] was standing.
>
> [Plaintiff] then proceeded down the ladder under his own power to the finish floor. I noticed his shirt was ripped and a slight bruise on his stomach. I examined the area and there was no evidence of any bleeding. [Plaintiff] stated his stomach hurt but he felt okay and was ready to continue working. So, we resumed work." (Affirmation in Opposition, exhibit A).

DISCUSSION

Citing *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], plaintiff argues that he is entitled to summary judgment on his Labor Law § 240(1) claim on the issue of liability because his evidence establishes, as a matter of law, that he was struck by a falling object that was improperly hoisted and inadequately secured. He alleges a further violation of section 240(1) based on his fall from the ladder, which he claims shattered as he was struck by the beam. He argues that defendants have no defense to his section 240(1) claim as there is no view of the evidence that he was the sole proximate cause of the accident, and that neither comparative negligence nor assumption of risk is a defense to a section 240(1) claim.

Defendants respond that summary judgment should be denied because there are material issues of fact regarding the circumstances of the accident and the adequacy of the safety devices. They argue that plaintiff and David are not credible witnesses because there are discrepancies in their testimonies regarding the location of the catwalk and who was holding the beam. They also claim that Zegarelli's report raises a question of fact regarding whether plaintiff fell off the ladder. Defendants further argue that there is no basis for summary judgment against Glenman Construction because the contract for the work was entered into

between Glenman Industrial and the State Fund.

In his reply, plaintiff argues that, without regard to whether he fell off the ladder, he has established a section 240(1) violation based on the hoisting apparatus (*i.e.*, the roustabout) since it is undisputed that the roustabout broke which caused the steel beam to free fall and strike him. He maintains that he is not required to prove multiple violations of the statute. He does not address Glenman Construction's argument that there is no basis for summary judgment against it since it did not sign the contract.

A. Summary Judgment Standards

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]).

B. 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]).[3] 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."

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]).

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[3]Defendants do not challenge to the applicability of the Labor Law on the basis that they are not "contractors" within the meaning of the statute.

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] [emphasis in original]). Moreover, in a falling object case, the applicability of the statute does not "depend upon whether the object has hit the worker. The relevant inquiry - one which may be answered in the affirmative even in situations where the object does not fall on the worker - is rather whether the harm flows directly from the application of the force of gravity to the object" (*id.*).

Here, plaintiff has established a prima facie violation of Labor Law § 240(1) based on the roustabout's failure to prevent the steel beam from striking plaintiff. The undisputed evidence establishes that, as a direct consequence of the application of the force of gravity, plaintiff was injured when the roustabout gave way, causing the hoisted beam to free fall and strike him (*see Runner*, 13 NY3d at 604; *Apel v City of New York*, 73 AD3d 406 [1st Dept 2010]). Plaintiff, therefore, has established a prima facie case that the roustabout was not operated in a manner as to afford him proper protection, in violation of section 240(1).

Defendants have failed to raise an issue of fact sufficient to defeat plaintiff's motion. Although defendants present evidence disputing whether plaintiff fell off the ladder, they do not dispute that the roustabout gave way, causing the beam to strike plaintiff as a direct consequence of the force of gravity (*see Runner*, 13 NY3d at 604; *Apel*, 73 AD3d at 406). Nor have they shown that plaintiff's conduct was the sole proximate cause of the accident (*see*

Kosavick, 50 AD3d at 288; *Moller*, 43 AD3d at 372).

Accordingly, plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1) is granted (*see Mescall v Structure-Tone, Inc.*, 49 AD3d 339, 339 [1st Dept 2008] [summary judgment was properly granted under section 240(1) to plaintiff ironworker who was injured when a crane that was lifting a steel screen failed, causing the screen to fall 20 feet in the air before striking plaintiff]; *Moller v City of New York*, 43 AD3d 371, 371 [1st Dept 2007] [section 240(1) was violated where hoisting mechanism failed while plaintiff was in the process of hoisting a two-ton structural piece from an elevated height to a platform]; *Apel*, 73 AD3d at 406; *Ray v City of New York*, 62 AD3d 591, 592 [1st Dept 2009]).

Further, the Court is unpersuaded by defendant's argument that summary judgment should not be awarded against Glenman Construction since it did not sign the contract with the State Fund. The Court notes that the stipulation upon which Glenman relies in support of their argument is not signed by plaintiff. Nor have defendants moved to dismiss Glenman Construction from this action.

For these reasons and upon the foregoing papers, it is,

ORDERED that plaintiff's motion for summary judgment is granted against defendants on the issue of liability under Labor Law § 240(1); and it is further,

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendants.

This constitutes the Decision and Order of the Court.

Dated: August 17, 2010

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**