SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID BENJAMIN COHEN** **PART** **IAS MOTION 58EFM**

Justice

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FREDERICO MENDONCA,

Plaintiff,

- v -

PLAZA CONSTRUCTION LLC and YONKERS WATERFRONT PROPERTIES, LLC,

Defendants.

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INDEX NO. 155011/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action arising from an alleged workplace accident, plaintiff Frederico Mendonca moves, pursuant to CPLR 3212, for summary judgment on his Labor Law §240(1) claim. Defendants Plaza Construction LLC ("Plaza") and Yonkers Waterfront Properties, LLC ("Yonkers") oppose the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On June 29, 2017, plaintiff, an employee of nonparty Advanced Contracting Solutions, LLC d/b/a ACS-NY, LLC ("ACS") was allegedly injured while stripping concrete forms from a wall at a construction site located at 63 Wells Avenue in Yonkers ("the premises"). Doc. 26 at pars. 4, 6. The incident occurred when an unsecured metal plate, which was part of a concrete

form, fell on him from above. Doc. 26 at pars. 2-8. The premises were owned by Yonkers and Plaza was the construction manager at the site. Doc. 20 at par. 4; Doc. 30.

Plaintiff commenced this action in May 2019. Doc. 1. In his amended complaint, he alleged that defendants were negligent and violated Labor Law sections 200, 240(1), and 241(6). Doc. 13.

In March and April 2020, plaintiff was deposed with the assistance of a Portuguese interpreter. Doc. 27. He testified at his deposition that the forms he removed were "really heavy" and were used to pour concrete to build concrete walls. Doc. 27 at 33-34. The forms were made of "iron or metal or steel" and were connected by a metal rod which ran between the two sides. Id. at 41-42. To remove a form, plaintiff had to unscrew the nut on the metal rod between the two sides of the form, thereby releasing the connection between the two sides of the form, and then push back the metal rod. 34, 42, 45-48. Just prior to the accident, the form which fell on him was still connected to the wall by two metal rods on his side of the wall. Id. at 47-48. He believed that other people working on the other side of the wall removed the metal rod on their side, causing the form to fall on him from a height of approximately 8 feet. Id. at 37-38, 49-51. Plaintiff stated that his co-worker, Henry Bohme, witnessed the incident. Id. at 52-53.

The day after the incident, plaintiff was in pain and, although he went to a doctor, he did not tell the physician that he had been struck by a form, and even told the doctor that his injury was not work-related. Doc. 27 at 65-66. He vehemently denied telling the doctor that he was injured while lifting a heavy piece of plywood while helping a friend with construction on his house. Doc. 27 at 88-89. He told his supervisors that he hurt his back working but did not tell them that he had been struck by a form because he was afraid of being fired. Doc. 27 at 69.

When he returned to work after the accident, plaintiff was still in pain and his boss had a co-worker take him for medical treatment. Doc. 27 at 53-55. The boss "made it clear to say and lie [sic] that [he] did not get hurt at work." Doc. 27 at 54.

Plaintiff sought treatment from Dr. Paulo Pereira, a chiropractor who spoke Portuguese, and admitted that he lied to the doctor by telling him that he was injured lifting something heavy because he was afraid of being fired. Doc. 27 at 92; Doc. 37.

At an examination by Dr. Jonathan Glassman, who had a Portuguese translator in his office, plaintiff admittedly lied and told the doctor that he was injured lifting a metal panel. Doc. 27 at 93-94; Doc. 38. He said he lied to Dr. Glassman because he "couldn't change [his version of the incident] at that point." Doc. 27 at 94.

Plaintiff also told a Dr. Capiola that he was injured carrying heavy materials, again admitting that he lied because he was afraid of being fired. Doc. 27 at p 96; Doc. 39.

At an examination by Dr. Moise, who also had an interpreter who assisted plaintiff, plaintiff again represented that he was injured lifting something. Doc. 27 at 97-98; Doc. 40.

Plaintiff admitted that he and his attorney signed an application for workers' compensation benefits, although he insisted that there was no Portuguese translator present and that he did not fill in the blanks on the form. Doc. 27 at 134-137; Doc. 43.

Plaintiff now moves for summary judgment on liability pursuant to Labor Law §240(1). In support of the motion, plaintiff's counsel submits an affirmation in which he asserts that plaintiff must be granted summary judgment on his Labor Law §240(1) claim because the statute requires that defendants provide him with proper equipment and/or safety devices to perform his work and failed to do so. Doc. 20.

Bohme, an employee of Plaza, submits an affidavit in support of the motion in which he represents that he witnessed the accident, which occurred when a "metal form fell on [plaintiff] causing him to step on some construction debris and fall on his back." Doc. 29. According to Bohme, the form which fell on plaintiff was approximately 8 feet tall and two feet wide, and weighed about 110 pounds. Doc. 29. Bohme further represents that the affidavit was translated to English from Portuguese, but the affidavit is not accompanied by the affidavit of a translator. Doc. 29.

In opposition to the motion, defendants submit an attorney affirmation in which counsel argues that the motion must be denied because plaintiff's medical records and plaintiff's application for workers' compensation benefits ("C-3 form") raise a triable issue of fact regarding how the accident occurred, i.e., whether plaintiff was injured as a result of lifting something heavy or being struck by the falling form. Doc. 34. Additionally, counsel asserts that, even if the statements made by plaintiff in the treatment records are considered to be hearsay, they can still be considered by this Court since they are not the only records upon which defendants' opposition is predicated. Doc. 34. Counsel further maintains that plaintiff has failed to establish a violation of Labor Law §240(1) because, if plaintiff was actually injured by a falling form, then his injuries were caused by "a failure of communication" with his co-worker and not due to the absence or inadequacy of any safety devices. Doc. 34. Further, counsel asserts that this Court must disregard Bohme's affidavit because it is not accompanied by the affidavit of a Portuguese translator. Doc. 34.

Among the documents submitted by defendants in opposition to the motion are the following:

1. Signed but unsworn records of Dr. Catalina Vazquez of City MD of Riverdale dated July 10, 2017 reflecting that plaintiff was injured the day before as a result of "carrying a heavy piece of plywood (Doc. 36);

2. A signed but unauthenticated ACS incident report dated July 17, 2017 reflecting that plaintiff was injured on June 29, 2017 while "lifting a panel" and that the accident was caused by "mis-handling of material" (Doc. 35);

3. Signed but unsworn records of Diana Arteta, D.C. of Pereira Chiropractic Office dated August 10, 2017 reflecting that plaintiff was injured one month prior while "lifting something heavy" (Doc. 37);

4. A sworn report by Dr. Jonathan Glassman dated November 20, 2017 reflecting, inter alia, that plaintiff was injured on June 29, 2017 "when he lifted a panel" while performing construction work (Doc. 38);

5. A signed but unsworn report of Dr. Anson Moise dated January 22, 2018 in which Dr. Moise states that plaintiff was injured on June 29, 2017 while "carrying a heavy object" while he was working in construction (Doc. 40);

6. A signed but unsworn report by Dr. Martin Diamond dated April 2, 2018 reflecting that plaintiff was injured on June 29, 2017 "due to heavy lifting at work" (Doc. 41);

7. A C-3 form (application for workers' compensation benefits) admittedly signed by plaintiff and his attorney, dated November 1, 2018, reflecting that plaintiff was injured on June 29, 2017 when he and a co-worker were "holding up heavy steel materials [and the co-worker let go [and plaintiff] had to support it by [himself and] injured [his] back"[1] (Doc. 27 at 134-136; Doc. 43);

8. An unsworn report by Dr. Jeffrey Lakin dated January 22, 2019, which reflects that plaintiff was injured at work on June 29, 2017 "while lifting a frame", and that plaintiff fell approximately 6 feet to the ground (Doc. 44).

In reply, plaintiff's counsel argues that the defendants have failed to raise an issue of fact warranting the denial of the motion. Doc. 46. He further asserts that plaintiff "has conclusively established that he was injured when an improperly secured metal and concrete form fell on him

[1] The form states inter alia, that plaintiff's signature "affirms that the information [he provides] is true and accurate to the best of his knowledge and belief"; and that "[a]ny person who knowingly and with INTENT TO DEFRAUD presents, causes to be presented, or prepares with knowledge or belief that it will be presented to, or by an insurer, or self-insurer, any information containing any FALSE MATERIAL STATEMENT or conceals any material fact, SHALL BE GUILTY OF A CRIME and subject to substantial FINES AND IMPRISONMENT" (emphasis in original). Doc. 43.

from a height of eight feet…" Doc. 46. Counsel also submits the affidavit of Rafael Fontes, who translated Bohme's affidavit in support of the motion, attesting to the accuracy of the translation. Doc. 47.

LEGAL CONCLUSIONS

Labor Law § 240 (1) provides, in pertinent part, that:

> 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) 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]). Importantly, Labor Law § 240 (1) "is designed to protect workers from gravity-related hazards . . . and 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]).

Here, plaintiff's deposition testimony, as well as the affidavit of Bohme, who witnessed the alleged accident, establish plaintiff's prima facie entitlement to summary judgment on his Labor Law § 240(1) claim since he was injured as the result of a gravity-related risk when an

unsecured object fell on him from above.[2] This shifted the burden to defendants to raise a material issue of fact, and this Court finds that defendants fulfilled this burden.

Evidence which supports a version of an accident other than that alleged by plaintiff, and which would not trigger a defendant's liability under Labor Law §240(1), is sufficient to overcome a plaintiff's prima facie showing and raise issues of fact precluding summary judgment (*see Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] ["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"]). Here, the discrepancies in plaintiff's accounts of the alleged accident are sufficient to raise issues of fact since one of the versions, that plaintiff was injured while lifting or carrying something heavy, suggest that the incident did not occur as the result of a violation of the statute (*see Ellerbe v Port Auth. of New York & New Jersey*, 91 AD3d at 442; *see also Smigielski v Teachers Ins. & Annuity Ass'n of Am.*, 137 AD3d 676, 676 [1st Dept 2016] ["material inconsistencies and contradictions about the circumstances of an accident and whether a plaintiff's injuries were proximately caused by a statutory violation of Labor Law §240(1) provide a basis for denying summary judgment"]).

"Assuming, without deciding, that the [documents submitted by defendants] are hearsay[3], they may be submitted in opposition to plaintiff's motion, and may bar summary judgment when considered in conjunction with other evidence" (*Marquez v 171 Tenants Corp.*, 106 AD3d 422, 423 [1st Dept 2013] [citation omitted]; *see also Erkan v McDonald's Corp.*, 146 AD3d 466, 468

[2] The failure of plaintiff's counsel to submit Fontes' affidavit with initial affirmation in support was a mere mistake and omission which is remedied on reply (See CPLR 2001). The submission did not constitute a belated attempt to cure deficiencies in the initial papers by raising new facts or arguments for the first time on reply (*cf., Migdol v City of New York,* 291 AD2d 201 [1st Dept 2002]).

[3] Curiously, plaintiff's counsel does not argue in his reply affirmation that the document submitted by defendants constituted hearsay.

[1st Dept 2017] [hearsay evidence may be considered in opposition to a motion for summary judgment, but only where the hearsay evidence is not the sole basis for opposing the motion]).

Here, it is clear that the defendants' opposition to the motion is based at least in part on admissible evidence, since Dr. Glassman's report is sworn (*See Moreno v Delcid*, 262 AD2d 464, 465 [2d Dept 1999]; *cf. James v Yoen Wah Rental, Inc*., 1 AD3d 237 [1st Dept 2003] [medical reports submitted in opposition to motion for summary judgment were neither sworn nor affirmed and were thus inadmissible]). Given that Dr. Glassman's report is sworn, this Court may consider the other evidence submitted in opposition to the motion as well.

Even assuming that the descriptions of the accident contained in plaintiff's medical records are not germane to his treatment and diagnosis, the entries in the records of City MD and the report of Dr. Glassman directly attribute to plaintiff a version of the incident contrary to that alleged herein and thus constitute admissions (*See Pina v Arthur Clinton Hous. Dev. Fund Corp*., 188 AD3d 614, 614-615 [1st Dept 2020] [citations omitted]). Therefore, even if these entries constitute hearsay, the defendants may submit them in opposition to the motion and this Court may consider them in conjunction with other evidence in the record containing a conflicting version of the accident (*See Pina v Arthur Clinton Hous. Dev. Fund Corp*., 188 AD3d at 614-615]).

Additionally, plaintiff's own C-3 form provides an inconsistent account of how the alleged incident occurred, further warranting the denial of the motion (*See Pina v Arthur Clinton Hous. Dev. Fund Corp*., 188 AD3d at 614-615 [1st Dept 2020]).

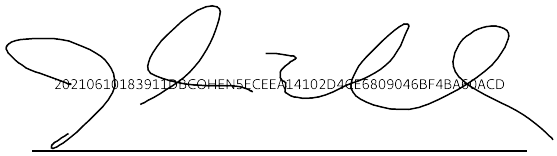
Given the foregoing, it is evident that plaintiff's contention that he "has conclusively established" that he is entitled to summary judgment pursuant to Labor Law §240(1) (Doc. 46) is without merit.

Finally, this Court notes that, although plaintiff testified that his boss told him to lie to medical providers by telling them that he was not injured at work, there is no indication in the motion papers that his boss told him to lie about *how* the incident occurred. Therefore, this Court rejects plaintiff's argument that he had no choice but to lie about how the incident occurred because he was afraid he would be fired.

The remainder of the parties' contentions are either without merit or need not be addressed in light of the conclusions above.

Accordingly, it is hereby:

ORDERED that plaintiff's motion for summary judgment on liability pursuant to Labor Law §240(1) is denied.



6/10/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**