To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOHN CARLSON,

Plaintiff,

-against-

TAPPAN ZEE CONSTRUCTORS, LLC, and
WELSBACH ELECTRIC CORP.,

Defendants.

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WELSBACH ELECTRIC CORP.,

Third-Party Plaintiff,

-against-

SCHUPP'S LINE CONSTRUCTION, INC.,

Third-Party Defendant.

----------X

TAPPAN ZEE CONSTRUCTORS, LLC,

Second Third-Party Plaintiff,

-against-

SCHUPP'S LINE CONSTRUCTION, INC.,

Second Third-Party Defendant.

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DECISION AND ORDER
Index No.: 58719/2019
Motion Date: 07/26/2022
Seq. No. 3

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 32 were read on this motion (Seq. No. 3) by plaintiff for an order granting summary judgment on the issue of liability on his Labor Law § 240(1) claims:

PAPERS	NUMBERED
Notice of Motion / Affirmation (Dearie) / Memorandum of Law / Exhibits A – X	1 – 27
Affirmation in Opposition (Woodhouse) / Response to Statement of Material Facts	28 – 29
Affirmation in Opposition (Petrossian) / Statement of Material Facts	30 – 31
Reply Affirmation (Dearie)	32

Upon the foregoing papers, the motion is denied.

Plaintiff seeks to recover damages for injuries allegedly sustained on July 30, 2018 at a worksite located at the Tappan Zee Bridge. By Notice of Motion filed on May 16, 2022, plaintiff seeks an order granting summary judgment against defendants Tappan Zee Constructors, LLC (TZC) and Welsbach Electric Corp. (Welsbach) (together, defendants) on the issue of liability pursuant to Labor Law § 240(1). Plaintiff, an employee of third-party defendant / second third-party defendant Schupp's Line Construction, Inc. alleges that he was working on an aerial boom lift attached to a barge in connection with the construction of the Gov. Mario M. Cuomo Bridge. While plaintiff was working on the lift platform approximately 100 to 150 feet above the barge on the river below, the wakes of two passing boats which exceeded the speed limit in a posted "no wake" zone caused the barge to rock. As a result of the barge rocking, the lift platform swung and crashed into the concrete tower plaintiff was working on, causing plaintiff to be tossed about the inside of the basket. It is undisputed that plaintiff did not fall and that no object fell.

Plaintiff contends that the lift upon which he was stationed was a safety device within the meaning of section 240(1) and thus was required to be so constructed, placed and operated as to provide him proper protection as he worked. Plaintiff contends that the lift failed to meet this standard, as the wakes of passing boats which caused the barge to rock and the lift to sway caused

plaintiff to be injured when he was tossed about the inside of the basket on top of the lift. Plaintiff contends that the fact that he did not fall and that nothing fell on him is immaterial, as a fall is not required to establish a section 240(1) claim.

In opposition, TZC contends that the fact that plaintiff did not fall and nothing fell on him is not only material but requires dismissal of plaintiff's claim.[1] TZC contends that the lift, harness and lanyard which were supplied to plaintiff did not fail to protect him, and in fact did exactly what the statute requires: they prevented him from falling as he worked on the elevated platform. TZC contends that section 240(1) was not intended to address every injury which occurs while a worker is working at a height, but rather is limited to specific types of hazards. TZC contends that plaintiff's accident is not of the type contemplated by the statute. Welsbach in opposition similarly contends that the accident in which plaintiff alleges he was injured simply does not fall within the limited types of hazards the statute was meant to address.

In reply, plaintiff contends that defendants' opposition fails to address his argument that a fall is not required to trigger liability under section 240(1). Plaintiff contends that liability is not limited to situations in which the plaintiff falls or an object falls on the plaintiff. Plaintiff contends that his injuries were the direct result of the application of the force of gravity, and thus that the strict liability of section 240(1) applies.

The Court has fully considered the submissions of the parties.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any

[1] The Court notes that separate motions for summary judgment filed by Welsbach (Seq. No. 2) and TZC (Seq. No. 4) are currently pending but were adjourned beyond the return date of the instant motion.

material issues of fact. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). As stated in *Scott v Long Island Power Auth.* (294 AD2d 348, 348, [2d Dept 2002]):

> It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v. Bay Isle Oil Co.*, 111 AD2d 366).

"Contractors and owners engaged 'in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' must provide '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'" (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 33 [2017], quoting Labor Law § 240(1)]. "Although the statute is meant to be liberally construed to accomplish its intended purpose, absolute 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'" (*id.*, quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]).

"Liability may, therefore, be imposed under the statute only where the 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). "Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists" (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 669 [2d Dept 2007], quoting *Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]). Liability does not attach if the claimed injuries are not caused by "a risk that can be avoided by proper placement or utilization of one of the devices listed in Labor Law § 240(1)" and "the protective equipment envisioned by the statute is... not designed to avert the hazard plaintiff encountered" (*Melber v 6333 Main St.*, 91 NY2d 759, 763 [1998]).

Plaintiff on this motion failed to make a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability on his section 240(1) claim, requiring denial of the motion without consideration of the sufficiency of the opposition (*Alvarez*, 68 NY2d at 324). Plaintiff cited, and this Court's research revealed, no controlling case holding that an incident of the kind in which plaintiff alleges he was injured triggers the absolute liability imposed by section 240(1).

Specifically, while it has been held that a plaintiff need not prove that he fell, or that a falling object struck him, in order to establish a section 240(1) claim (*see Runner*, 13 NY3d at 599), every controlling case holding a defendant liable under section 240(1) involved either a plaintiff who fell or an object that fell. For example, in *Runner*, although the plaintiff did not fall

and no object fell on him, the plaintiff was injured while in the act of lowering a heavy object down a flight of stairs. The plaintiff, who was holding a rope attached to the object, was pulled by the weight of the falling object horizontally into a bar over which the rope was routed, causing injury to his hands. In the matter at bar, it is undisputed that neither plaintiff nor any object involved in plaintiff's work fell.

Plaintiff relies on *Lind v Tishman Constr. Corp. of N.Y.*, 180 AD3d 505 [1st Dept 2020] for the proposition that a worker inside a lift basket need not fall out of the basket to establish a section 240(1) claim. Notwithstanding that *Lind* is not controlling, that case is factually dissimilar to the matter at bar and thus is not persuasive. In *Lind*, the lift on which the plaintiff was working malfunctioned when its brakes failed, and the lift itself therefore fell down a ramp. The motion Court in *Lind* specifically found that the allegedly slippery condition of the ramp alone could not have caused the accident without "the failure of the braking system" of the lift (*Lind v Tishman Const. Corp. of N.Y.*, 2019 NY Slip Op 30623[U] [Sup Ct, NY County 2019]). There is no contention in this matter that any part of the lift on which plaintiff was working fell because it did not function as intended.

The distinction between cases in which the accident involving a worker working at a height is within the ambit of section 240(1) and those in which the hazard is not of the type contemplated by the statute is illustrated in numerous cases. For example, in *Striegel v Hillcrest Hgts. Dev. Corp.* (100 NY2d 974, [2003]), the plaintiff slipped on frost and slid down a sloped roof but was stopped from falling to the ground when his pants snagged on protruding nails. The Court of Appeals held that liability could be imposed pursuant to section 240(1) because plaintiff was working at a height, was injured by a fall, and no safety device had been provided. The Court stated:

> "The application of section 240(1) does not hinge on whether the worker actually hit the ground. This argument, accepted by the dissent below, represents an overly strict interpretation of section 240(1). It would exclude from section 240(1) workers who succumb to elevation-related risks but, for whatever reason, do not make it to the ground. For instance, a window washer who is injured when a scaffold drops 20 floors but stops before hitting the ground would not be covered" (*id.* at 978).

In contrast, a plaintiff who was wearing stilts in order to work on a ceiling, and who fell after slipping on ice, was not within the ambit of section 240(1) because his injuries resulted from a slip on ice, which "was a hazard unrelated to the elevation risk that necessitated the provision of a safety device in the first instance" (*Nicometi*, 25 N.Y.3d at 101; *see also e.g. Guallpa v Canarsie Plaza, LLC*, 144 AD3d 1088 [2d Dept 2016] [plaintiff's foreman was operating a hi-lo forklift on the ground, and the machine either struck or pushed an elevated steel beam that was connected to the steel beam that the plaintiff was working with, causing the steel beam to move and pin the plaintiff's left elbow against a concrete wall; case not within 240[1]); *Gasques v. State of New York*, 59 A.D.3d 666 [2d Dept. 2009] [claimant was injured while ascending bridge on two-point suspension scaffold when he stopped scaffold and his hand was crushed between motor control of scaffold and steel of bridge; section 240(1) claim was dismissed since claimant's injury, while tangentially related to effects of gravity, was not caused by limited type of elevation-related hazards encompassed by statute]; *Tsatsakos v Citicorp*, 295 AD2d 500 [2d Dept 2002] [plaintiff, a window washer, was injured when scaffold swung laterally into a window; section 240(1) claim was dismissed since plaintiff was not injured in connection with an elevation hazard]; *Milligan v Allied Bldrs., Inc.*, 34 AD3d 1268 [4th Dept 2006] [plaintiff was injured when he tripped over uneven planking of scaffold and fell to one knee; section 240(1) claim dismissed since plaintiff was not injured while falling from, or attempting to prevent himself from falling from, scaffold]).

In addition, as it is undisputed that plaintiff at all times remained secured inside the basket atop the lift, and in light of the fact that there is no contention that the lift failed to operate as intended, plaintiff's submission failed to establish that, as a matter of law, "the device did not serve the core objective of Labor Law § 240(1) – preventing plaintiff from falling" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Further, to invoke the protections of section 240(1), "the risk requiring a safety device must be a foreseeable risk inherent in the work" (*Niewojt v Nikko Constr. Corp.*, 139 AD3d 1024, 1027 [2d Dept 2016], citing *Gordon v Eastern Ry. Supply*, 82 NY2d 555 [1993]; *McLean v 405 Webster Ave. Assoc.*, 98 AD3d 1090 [2d Dept 2012]; *Balladares*, 40 AD3d at 667). Plaintiff's submission fails to establish that, as a matter of law, large boats speeding through a posted "no wake" zone in which a bridge is being constructed was a "foreseeable risk inherent in the work" plaintiff was performing at the time of the accident (*id.*).

Plaintiff's submission further failed to establish that boat wakes are "a risk that can be avoided by proper placement or utilization of one of the devices listed in Labor Law § 240(1)" or that "the protective equipment envisioned by the statute" (the lift) was "designed to avert the hazard plaintiff encountered" (the boat wakes) (*Melber*, 91 NY2d at 763). Plaintiff's engineer's opinion that the installation of a "wave attenuator system" (Plaintiff Exh. A at ¶ 25) would have guarded against the hazard posed by the wakes of speeding boats is of no moment, as section 240(1) does not contemplate the use of devices of that kind (*see Melber*, 91 NY2d at 763). Plaintiff's engineer's further opinion that the risk could have been eliminated via the use of "a hanging scaffold or an articulating aerial lift designed for reaching down below bridge decks" (Plaintiff Exh. A at ¶ 25) is conclusory and fails to eliminate triable issues of fact, as nothing in the Affidavit indicates that the bridge, which was under construction, was in such a state as to permit the use of such devices.

Accordingly, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that, within ten (10) days of the date hereof, defendants shall serve a copy of this Decision and Order, with notice of entry, upon all other parties; and it is further

ORDERED that within ten (10) days of service of notice of entry, defendants shall file proof of said service via NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 4, 2022
White Plains, New York

E N T E R:

Damaris E. Torrent

HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF