At a term of the Supreme Court of State of New York, held in and for the County of Chautauqua, 3 North Erie Street, Mayville, NY held on the 5th day of October 2021.

PRESENT: HON. LYNN W. KEANE, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CHAUTAUQUA

MARK A. STONEHAM and
BONNIE STONEHAM,

DECISION AND ORDER

Plaintiff,

INDEX NO. EK1 2018 001915

-vs –

JOSEPH BARSUK, INC.,
DAVID BARSUK, LLC,
HARRY BARSUK, LLC
BARSUK RECYCLING, LLC,
BARSUK TRADING PARTNERS, L.P.,
BARSUK RENTALS, LLC,
BARSUK HOLDINGS, LLC,
BARSUK BUFFALO PROPERTIES, LLC,
DAVID J. BARSUK, individually, and
HARRY MARK BARSUK, individually,

Defendants.

The plaintiffs bring this motion for summary judgment under CPLR §3212 seeking a finding that David J. Barsuk ("Barsuk" or simply "defendant") violated Labor Law §240(1). The defendants have opposed the plaintiffs' motion and have cross moved to dismiss the plaintiffs' Labor Law §240(1) cause of action on various grounds.

BACKGROUND

Mark A. Stoneham ("Stoneham" or simply "plaintiff") was injured on August 18, 2018 at a scrapyard located at 3604 Pearl Street, Batavia, NY. Plaintiff used a front-end loader to lift a large trailer ("the trailer") for the purpose of replacing a leaking air tank in the air brake system. The incident took place when the front-end loader rolled backwards, which allowed the trailer to fall on plaintiff while he was working beneath it.

Mr. Stoneham had bolted the tank in place and was attaching the last of the four hoses to the

brake chamber when the incident occurred.

The incident is captured on video surveillance.

Barsuk was a shareholder in Joseph Barsuk, Inc., David Barsuk, LLC, Harry Barsuk, LLC, Barsuk Recycling, LLC, Barsuk Trading Partners L.P. Barsuk Rentals, LLC, Barsuk Holdings, LLC, Barsuk Buffalo Properties, LLC, and the owner of the 2000 Trailex trailer.

Joseph Barsuk, Inc. was the owner of the front-end loader.

The plaintiff alleges that his activities were an activity protected by Labor Law §240(1) and that the defendant, as the owner, violated Labor Law §240(1) by failing to provide plaintiff with adequate safety devices.

SUMMARY JUDGMENT

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact,' Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986) and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.''' Vega v Restani Const. Corp. 18 N.Y.3d 499, 503 (2012).

SOLE PROXIMATE CAUSE

The defense cross moves to dismiss the plaintiffs' Labor Law §240(1) cause of action on the ground that "…there is no liability under the statute when the evidence establishes that a plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice, he would not have been injured.'' Piotrowski v McGuire Manor, Inc., 117 A.D. 3d, 1390-91 (4th Dept. 2014)

The defense argues that, as between the plaintiff and defendant, the plaintiff was the expert in mechanical work. The defense argues that various items were available to block the wheels, including timbers sitting on the front loader and other lumber on the property and plaintiff elected not to use them. The plaintiff denies that timber was on the front loader at the time of the accident. Relying upon the affidavit of John Coniglio, a safety consultant, plaintiffs argue that the timbers and lumber available on site were insufficient safety devices in any event. Plaintiffs argue that safety blocks and stanchions or commercial jack stands were required to prevent the loader from rolling.

The defense denies that Mr. Barsuk controlled the means and methods of the plaintiff's work, and defense claims that plaintiff did not have permission to be on site on the date of the incident. The plaintiff argues that he used the front loader to lift the trailer on August 18, 2018 after observing Mr. Barsuk do so on August 4, 2018, and that he was on site that day with the knowledge and consent of the defendant.

The record does not support a finding that adequate safety devices were available, that plaintiff knew both that they were available and that he was expected to use them; and that he chose for no good reason not to do so. Piotrowski v McGuire Manor, Inc., 117 A.D. 3d, 1390-91

(4th Dept 2014). The court finds that defendants have failed to carry their burden in establishing their entitlement to summary judgment on the issue of sole proximate cause. Zuckerman v City of New York, 49 N.Y.2d 557 (1980).

PLAINTIFF'S WORK ON THE TRAILER AS A PROTECTED ACTIVITY

In moving for summary judgment, plaintiffs seek to invoke the "exceptional protection" afforded to workers who are injured while performing any one of the seven enumerated activities deemed by the legislature to be "inherently risky" because of the "relative elevation at which [such tasks] must be performed" and the consequent hazards related to the effects of gravity. Rocovich v Consoli. Edison Co., 78 N.Y.2d 509,514 (1991)

In order to succeed on his motion for summary judgment under Labor Law §240(1), Mr. Stoneham must establish, as a matter of law that he was "employed" and not just a volunteer; and that the work he was performing constituted a repair to a structure under the statute.

The defendants seek dismissal of plaintiffs' Labor Law §240(1) arguing the plaintiff was only a volunteer, and not an employee, and that because plaintiff was engaged in vehicle maintenance, it is not a protected activity under Labor Law Section §240(1).

PLAINTIFF'S STATUS AS AN EMPLOYEE OF DEFENDANT

In order to invoke the protection afforded by Labor Law §240(1) and to come within the special class for whose benefit liability is imposed upon contractors, owners and their agents, a "plaintiff must demonstrate that he [or she] was both permitted to suffer work on a building or structure and that he [or she] was hired by someone, be it owner, contractor or their agent.'' Stringer v Musacchia, 46 A.D.3d 1274-6 (3rd Dept 2007). Mordkofsky v V.C.V Dev. Corp., 76 N.Y.2d 573, 576-577 (1990) quoting Whelen v Warwick Val. Civic and Social Club, 47 N.Y.2d 970, 971 (1979)

The defendant denies that plaintiff worked for him on the date of the accident, describing the plaintiff's work on the air brake system as one of many favors exchanged between the longtime friends over the years. Plaintiff testified, however, that in the months before the accident, defendant had loaned him $25,000. Plaintiff claims he was repaying a portion of the loan, as agreed upon, by providing defendant with manual labor in the form of work on the airbrakes system on the trailer. Plaintiff relies upon a line of cases holding that manual labor performed to fulfill a financial obligation can establish protection under Labor Law §240(1). Thompson v Marotta, 256 A.D. 2d 1124 (4th Dept. 1998).

The court rejects the defendants' claim that that the Labor Law §240(1) claim should be dismissed because plaintiff was a volunteer. Plaintiff has produced sufficient evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Alvarez, 68 N.Y.2d at 324 citing Zuckerman v City of New York, 49 N.Y.2d 557 (1980).

PLAINTIFF'S WORK ON THE BRAKES

Plaintiffs seek the special protections of Labor Law §240(1), asking this court to treat the trailer as a structure under the statute.

Mr. Stoneham testified in detail about his activities on the date of his injury. He was on site to replace a leaking air tank contained within the trailer's braking system. After arriving on site, Mr. Stoneham stood next to the trailer as he attached four hoses to the air tank. At approximately 12:28 pm, at least as shown by the timestamp on the surveillance video, he crawled under the trailer as it was being held up by the bucket of the front loader. At the time of his injury, at approximately 12:57 pm, Mr. Stoneham had finished bolting the tank in place, using four bolts, and was attaching the fourth and final hose to the brake chamber when the trailer fell. Other than the front loader, the only other equipment used was a rubber mat and open-ended wrenches. He did not use any blocking, believing that the airbrake on the front-end loader was sufficient to hold the front loader in place.

The record confirms that no other construction or renovation was taking place on the date of the occurrence.

As the proponents of the motion for summary judgment, plaintiffs were required to "make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact for the case." Winegrad v New York Univ. Med., Ctr., 64 N.Y.2.d 851, 853, (1985). For the reasons discussed below, plaintiffs failed to meet that burden with respect the Labor Law §240(1) claim.

Labor Law §240(1) imposes absolute liability on building owners and contractors whose failure to "provide proper protection to workers employed on a construction site proximately causes injury to a worker. Wilinski v 334 E. 92nd Hous. Dev. Fund Corp., 18 N.Y.3d 1,7 [2011], quoting Misserritti v Mark IV Constr. Co., 86 N.Y.2d 487, 490 (1995).

The plaintiff's work was limited to the replacement of a leaking air tank on the trailer's brake system. This kind of work is performed every day on trucks and trailers outside of a construction setting. It requires no specials tools, aside from a mechanism to lift the truck or trailer. The plaintiff's task required the use of some open-ended wrenches and a rubber mat. Under the plaintiffs' liberal application of Labor Law §240(1), every truck mechanic who raises a truck on a lift in his or her shop would be subject to absolute liability under Labor Law §240(1).

The plaintiffs have not identified, nor has the court found, any cases to support such a broad application of the provisions of Labor Law §240(1).

It has been held that the dismantling of a vehicle unrelated to a building or structure is not a protected activity under Labor Law §240(1). Strunk v Buckley, 251 A.D. 491, (1998). It is also well settled that Labor Law §240(1) does not apply to routine maintenance in a non-construction, non-renovation context. Clause v Global Metallurgical, Inc., 160 A.D.3d 1463 (2018), quoting Ozimek v Holiday Val., Inc., 83 A.D.3d 1414, 1415 (4th Dept. 2011).

For the reason stated above, the court finds that the plaintiff was not engaged in "the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building" within the meaning of Labor Law §240(1). In view of the strict liability imposed by the statute and the fact that such liability is generally imposed only to guard against inordinate dangers, the court finds no reason to strain the language of the statute to encompass the routine activities involved with repairing the brake system on a trailer, which is clearly distinguishable from the risks associated with the construction or demolition of a building. Consentino v Long Island R.R., 201 A.D. 2d

528 (2nd Dept. 1994).

In responding to defendants' motion to dismiss the Labor Law §240(1) cause of action, the plaintiffs have failed to establish the existence of material issues of fact which require a trial of the action.

WHEREFORE, it is,

ORDERED, that Plaintiffs' motion seeking summary judgment under Labor Law §240(1) pursuant to CPLR §3212 is DENIED, and it is further

ORDERED, that Defendants' cross motion seeking summary judgment dismissing Plaintiffs' claim under Labor Law §240(1) pursuant to CPLR §3212 is GRANTED.

This shall constitute the Order of the Court.

DATED: October 5, 2021

Lyn W. Keane

HON. LYNN W. KEANE, J.S.C.