SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1357

CA 12-01064

PRESENT: CENTRA, J.P., FAHEY, VALENTINO, AND MARTOCHE, JJ.

JOSEPH LUNA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ZOOLOGICAL SOCIETY OF BUFFALO, INC.,
DEFENDANT-APPELLANT.

LAW OFFICES OF LAURIE G. OGDEN, ROCHESTER (GARY J. O'DONNELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 17, 2011. The order granted the motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained while working as a carpenter on a construction project for defendant. Supreme Court properly granted plaintiff's motion for partial summary judgment on liability with respect to the Labor Law § 240 (1) claim. Plaintiff sustained his initial burden of establishing that he was injured as the result of a fall from an elevated work surface and that defendant failed to provide a sufficient safety device (*see Ferris v Benbow Chem. Packaging, Inc.*, 74 AD3d 1831, 1832; *see generally Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603). In opposition, defendant failed to raise a triable issue of fact whether plaintiff's " 'own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of the accident' " (*Mazurett v Rochester City School Dist.*, 88 AD3d 1304, 1305, quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). We reject defendant's contention that there is an issue of fact whether plaintiff was a recalcitrant worker whose own actions were the sole proximate cause of the accident. Although defendant submitted evidence that plaintiff was instructed not to work in a particular area and violated those instructions, "the nondelegable duty imposed upon the owner and general contractor under Labor Law § 240 (1) is not met merely by providing safety instructions or by making other safety devices available, but by furnishing, placing and operating such devices so as to give [a worker] proper protection" (*Long v Cellino &*

Barnes, P.C., 68 AD3d 1706, 1707 [internal quotation marks omitted]), which was not done here. Thus, "[t]he mere failure by plaintiff to follow safety instructions does not render plaintiff a recalcitrant worker" (*Whiting v Dave Hennig, Inc.*, 28 AD3d 1105, 1106 [internal quotation marks omitted]).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court