

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32088
H/ct

_____AD3d_____

Argued - March 24, 2011

REINALDO E. RIVERA, J.P.
THOMAS A. DICKERSON
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2010-02474

DECISION & ORDER

Arcadio Vasquez, respondent, v George Minadis, etc.,
defendant, Langsam Property Services, Corp., et al.,
appellants.

(Index No. 10393/08)

Marshall Conway Wright & Bradley P.C. (Gannon, Rosenfarb & Moskowitz, New York, N.Y. [Lisa L. Gokhulsingh], of counsel), for appellants.

Ginarte O'Dwyer Gonzalez Gallardo & Winograd LLP, New York, N.Y. (Richard M. Winograd and Brian Isaac of counsel), for respondent.

In an action to recover damages for personal injuries, the defendants Langsam Property Services, Corp., Mark Engel, doing business as Langsam Property Services, Corp., and 21-29 45th Road, Inc., doing business as Langsam Property Services, Corp., appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (McDonald, J.), dated January 14, 2010, as denied their cross motion for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is modified, on the law, by deleting the provisions thereof denying those branches of the cross motion of the defendants Langsam Property Services, Corp., Mark Engel, doing business as Langsam Property Services, Corp., and 21-29 45th Road, Inc., doing business as Langsam Property Services, Corp., which were for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against them and substituting therefor provisions granting those branches of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The appellants owned a three-story building (hereinafter the premises) occupied by

Artamus Restaurant Equipment Company, Inc. (hereinafter Artamus), a restaurant supply business. The plaintiff worked for Artamus as a general handyman, and lived in an apartment in a building adjacent to the premises. On February 14, 2008, at the invitation of the appellants, a roofer came to the premises to investigate a reported problem with leaks from the roof of the premises. The plaintiff testified at his deposition that access to the roof from inside the premises through the stairwell was permanently sealed off by the appellants, so his supervisor directed him to take the roofer to his apartment to climb through his kitchen window to the roof of the premises. While attempting to re-enter his apartment, the plaintiff slipped and fell three stories onto the concrete ground. The plaintiff commenced this action against, among others, the appellants, to recover damages for personal injuries, alleging violations of Labor Law §§ 200, 240(1), and 241(6), and common-law negligence.

The Supreme Court should have granted those branches of the appellants' cross motion which were for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action insofar as asserted against them. With respect to Labor Law § 240(1), while "the reach of section 240(1) is not limited to work performed on actual construction sites, the task in which an injured employee was engaged must have been performed during 'the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure'" (*Martinez v City of New York*, 93 NY2d 322, 326 [citation omitted]; see *Schroeder v Kalenak Painting & Paperhanging, Inc.*, 7 NY3d 797, 798; *Martinez v City of New York*, 73 AD3d 993, 996). The statute provides "no protection to a plaintiff injured before any activity listed in the statute was under way" (*Panek v County of Albany*, 99 NY2d 452, 457; see *Enos v Werlatone, Inc.*, 68 AD3d 713, 714). Here, the appellants established that the work in which the plaintiff was assisting was merely investigatory, and that the plaintiff was not a person employed to perform an activity enumerated under Labor Law § 240(1) (see *Martinez v City of New York*, 93 NY2d at 326; *Martinez v City of New York*, 73 AD3d at 996; *Enos v Werlatone, Inc.*, 68 AD3d at 714). With respect to Labor Law § 241(6), the appellants established that the accident did not result from construction, excavation, or demolition work (see *Nagel v D & R Realty Corp.*, 99 NY2d 98, 101; *Martinez v City of New York*, 73 AD3d at 996; *Enos v Werlatone, Inc.*, 68 AD3d at 715). In opposition, the plaintiff failed to raise a triable issue of fact.

However, the Supreme Court properly denied those branches of the appellants' cross motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against them. Although the appellants demonstrated that they did not have the authority to supervise or control the plaintiff's work (see *Ortega v Puccia*, 57 AD3d 54, 61-62), they did not make a prima facie showing of their entitlement to judgment as a matter of law with respect to the plaintiff's allegation that their act of permanently sealing off access to the roof from inside the premises created a dangerous condition (see *Galindo v Town of Clarkstown*, 2 NY3d 633, 636).

RIVERA, J.P., DICKERSON, LOTT and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court