

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA
Justice

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ROBERT GITTLESON and SANDY GITTLESON,

Plaintiffs, Index No.: 13987/04

- against -

COOL WIND VENTILATION COPR. and 37th AVENUE
ASSOCIATES, LLC.,

Defendants.

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The following papers numbered 1 to 231 on this motion:

Papers	<u>Numbered</u>
Defendants' Notice of Motion-Affirmation- Affidavit (s) -Service-Exhibit (s)	1-123
Plaintiff's Affirmation in Opposition- Affidavit (s) -Exhibit (s)	124-205
Defendant's Reply Affirmation - Exhibit (s)	206-231

By notice of motion, co-defendant 37th Avenue Associates, LLC (37th Avenue Associates) seeks an Order of the Court, pursuant to CPLR §3212, granting summary judgment dismissing plaintiffs' complaint. Further, if issues of fact exist that warrant a denial of summary judgment, defendant seeks an Order granting it conditional common law indemnification on a cross-claim against co-defendant Cool Wind Ventilation Corp. (Cool Wind). Plaintiff files an affirmation in opposition and defendant replies.

The relevant parties to this action include plaintiff Robert Gittleson (Gittleson), who was injured on November 6, 2003 while installing a camera to update an existing surveillance system at the premises of 40-06 37th Avenue, Long Island City, New York (subject premises). The subject premises were owned by 37th Avenue Associates.

The underlying action involves a personal injury claim for injuries allegedly sustained by plaintiff while working at the subject premises. Plaintiff claims that he fell backwards from the second step of a ladder after completing installation of an outside camera.

Plaintiff, the president of his company, Closed Circuit Too, from 1986 until 2005, was in the business of installing, servicing, and maintaining closed circuit television surveillance systems. In November 2003 plaintiff's company was hired by Cool Wind to update an existing surveillance system by replacing old cameras with newer models. This job frequently required plaintiff to ascend ladders in order to install security cameras in high places. At the time of the accident plaintiff was using a ladder owned by Cool Wind (Plaintiff's Dep. p.80). Although plaintiff normally used his personal "Little Giant" ladder (Plaintiff's Dep. pp.68-9), on this particular occasion he used an A-frame stepladder owned by Cool Wind that had already been placed at the installation location for the particular camera (Plaintiff's Dep. p.p.80-86.) Plaintiff contends that the Cool Wind stepladder was set up in a dangerous and improper manner in that it was in the closed position and simply leaned against the building rather than being opened, locked, and secured. As plaintiff explains, an A-frame stepladder is designed to open up and lean up against the building. Because this ladder was shut and leaning against the building in an improper manner, plaintiff claims it bowed or flexed upon his descent, causing him to miss the step and fall. Plaintiff maintains that he did not discover the improper setup until after the accident. Such a claim, however, is belied by the fact that plaintiff had specialized in the business of closed circuit installation for nearly 20 years, making him highly knowledgeable in the area of ladder utilization and the propriety of their setup. See *Biondi v. Beekman Hill House Apt., Corp.*, 257 A.D.2d 76, 80 (1st Dep't 1999) (holding that although a summary judgment motion presumes the facts to be true and accorded every favorable inference, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration). Moreover, the fact that plaintiff's partner, Abbey Daniel, worked on the allegedly defective ladder both immediately prior to and after plaintiff's accident with no difficulties indicates a lack of deficiency in the setup of the ladder.

Plaintiff's complaint alleges causes of action in negligence and allegations that his accident was caused by violations of New York State Labor Law §§200, 240, and 241(6). Specifically, plaintiff's verified bill of particulars alleges that the defendants

...were negligent, careless and reckless in the ownership, operation, management, supervision, control, inspection and maintenance, in causing, permitting and allowing a dangerous, hazardous, and defective condition to exist and/or remain at the aforesaid premises; in allowing the property to be kept in a dangerous condition; in maintaining the premises in a careless and reckless manner; in subjecting the plaintiff to an unreasonable risk due to the dangerous and hazardous condition thereat; in failing to properly inspect, operate, and manage the premises; in failing to provide plaintiff an alternate means of reaching the required height at the area at said location; in failing to take reasonable measures so as to remove and/or remedy said hazardous condition; in failing to provide a safe and secure ladder; in failing to provide proper flooring under the ladder; in failing to provide proper safety equipment so placed and secured as to provide plaintiff with the proper protection; in placing the ladder in an insecure position; by improperly placing and securing the ladder; in failing to timely and properly clear the area; in failing to warn the plaintiff of the dangerous and otherwise hazardous condition which existed thereat; and in failing to protect the safety or otherwise warn the plaintiff with respect to said dangerous and otherwise hazardous condition.

Defendants' contend that the fall was caused by plaintiff's mistaken belief that he had reached the bottom step of the ladder, causing him to lean backwards expecting to touch the ground. As a result of leaning backwards, plaintiff missed the bottom step of the ladder. Because it was plaintiff's own misjudgment that led to his injuries, defendants' contend that he was the sole proximate cause of his injuries and any subsequent claim against them is therefore without merit and should be dismissed. In support of this contention, defendants' proffer the deposition testimony of David Sullivan, Chris Koonge, and the affidavit of Abbey Daniel. Sullivan, the president of Cool Wind, testified that after learning about the accident, he went to the scene of plaintiff's fall to inquire. While there, both plaintiff and Daniel specifically told him that the plaintiff had missed a step while he was coming down the ladder thinking he was on the bottom step, causing him to fall (Defendants' Exhibit F p.36). Koone, a Cool Wind employee, corroborated Sullivan's testimony with his own testimony that he heard plaintiff say that he thought he had reached the ground, that he had reached the last step (Defendants' Exhibit G p.25). Daniel's affidavit reiterates that plaintiff expressly stated that he thought he had reached the ground (Defendants' Exhibit A). In addition to this

testimony, defendants' proffer the various hospital and ambulance call records indicating that plaintiff merely slipped and missed the step (Defendants' Exhibit H).

As a preliminary matter, it should be noted that the standard for summary judgment requires the proponent of the motion, 37th Avenue Associates, to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form." *Santanastasio v. Doe*, 301 A.D.2d 511, 753 N.Y.S.2d 122 (2d Dep't. 2003). Further, when reviewing a defendant's motion for summary judgment we are required to accept as true the allegations of the complaint. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (N.Y. 1977). However, "factual claims flatly contradicted by indisputable documentary evidence are not entitled to such consideration." *Acquista v. N.Y. Life Ins. Co.*, 285 A.D.2d 73, 76 (1st Dep't 2001) (citing *Biondi* at 80). As discussed herein, defendant has sufficiently met its prima facie burden for summary judgment. Thus, the burden shifts to plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (N.Y. 1980).

Plaintiff's complaint seeks relief under New York State Labor Law §§200, 240, and 241(6). Accordingly, each cause of action shall be addressed separately to determine if material issues of fact exist to warrant denial of summary judgment.

The New York State Labor Law provides employees with basic protections in the workplace. Through its enactment, the legislature intended to prevent, or at the very least deter workplace accidents, hence the oft-referred nom de guerre of these laws being the "safe place to work statutes." Further, compliance with these laws generally imposes an absolute duty on owners to their injured employees. Thus, an absolute liability under the labor laws may be found merely because the work occurred on the owner's premises.

Plaintiff's first cause of action arises under Labor Law §200, which provides the general common-law principles governing the duties of landowners. This section requires in pertinent part that owners provide workers with a safe place to work, so "as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein." Labor Law §200. To procure a safe workplace, all equipment on the premises is required to be "placed, operated, guarded, and lighted as to provide reasonable and adequate protection" to employees. *Id.* Because this section merely incorporates the general common-law standard, the duties created are delegable. See *Ross v. Curtis-*

Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 503 (N.Y. 1993); *Bland v. Manocherian*, 66 N.Y.2d 452, 460 (N.Y. 1985). Plaintiff contends that because the improper setup of the ladder that caused the accident was owned and setup by employees of Cool Wind, defendants breached their common-law duty of care and liability is therefore proper under this section. However, because plaintiff's claim arises out of the alleged improper setup of the ladder, "recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation." *Id.* at 505 (citing *Lombardi v. Stout*, 80 N.Y.2d 290, 295 (N.Y. 1992)). This requirement under §200 is based on the common-law principle that "an owner or general contractor [sh]ould not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control." *Id.* Plaintiff offers insufficient proof to create a triable issue of fact that defendants exercised the requisite degree of supervision and control over the portion of work that led to the injury. Plaintiff was the president of the company hired to install the cameras and provided himself with an adequate ladder and tools to complete the project. He was not required to use Cool Wind's tools, and in fact had used his own ladder earlier in the day to install other cameras. His contract with Cool Wind stipulated no supervisory control over his methods of installation. His helper was hired by him and adhered to his methods and techniques of installation. Further, Cool Wind exercised no control over the positioning of the ladder, and plaintiff was aware of the open and obvious impropriety of its setup. As such, plaintiff's injuries arose from his own installation methods, with no supervisory control over his operations exercised by defendants. Accordingly, no liability attaches under §200.

Plaintiff's second cause of action arises under Labor Law §240(1), commonly referred to as the "scaffold law", which, in contrast to §200, provides the "specific, positive commands applicable to all owners and contractors." *Ross* at 503. Because the provisions under this section are self-executing in that they do not require reference to outside sources to determine the applicable standard a defendant's conduct is to be measured, the duties created under this section are nondelegable. Thus, "an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work." *Id.* at 500. This section stipulates in pertinent part:

All contractors and owners...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...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 construction workers employed on the premises].

Although it is without question that the scaffold law imposes the most stringent duties upon owners and contractors and is to be construed as liberal as is necessary to effectuate its purpose to protect and regulate workplace conduct by placing responsibility for workers safety with owners and contractors, such duties have their limits. The legislative intent in the statute's enactment was to prevent accidents in which a scaffold, either through a defect or inadequacy, provides insufficient protection to the worker from harm. Thus, the statute imposes an obligation upon owners and contractors to furnish suitable and adequate devices to workers engaged in the dangerous business of construction. A meritorious claim, therefore, requires satisfaction of a two-prong test that the worker's activity was, one, protected under the statute, and two, that the injury was the proximate cause of the owner's or subcontractor's violation of the statute. In other words, that the plaintiff's actions were not the sole proximate cause of his injuries. See *Robinson v. East Med. Ctr., LP*, 6 N.Y.3d 550, 554 (N.Y. 2006); *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 960 (N.Y. 1998); see also *Cahill v. Triborough Bridge & Tunnel Auth.*, 4 N.Y.3d 35 (N.Y. 2004); *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280 (N.Y. 2003).

It is undisputed that the activity engaged in by the plaintiff, installing security cameras above a parking garage, is among the enumerated activities covered under the statute and could hardly be considered mere routine maintenance. See, e.g., *Guzman v. Gumley-Haft, Inc.*, 274 A.D.2d 555 (2d Dep't 2000).

Plaintiff has not, however, offered sufficient proof that Cool Wind's failure to provide plaintiff with sufficient protection was in any way a proximate cause of his injuries. Plaintiff testified that he had been the president for almost twenty years of a company that specialized in the installation, service, and maintenance of closed circuit television surveillance systems. Throughout his twenty year tenure with his company, plaintiff was frequently required to use ladders in order to install or service electronic devices as the particular task necessitated. His claim that he did not recognize the deficiency in the ladder's setup until after the accident is therefore unavailing. Moreover, even if plaintiff's allegation that the ladder had already been setup by Cool Wind employees when he and his partner began to work on it is accepted by this Court, plaintiff certainly must have recognized the obvious deficiencies of the ladder's setup, yet still ascended and worked

atop it despite such recognition. Further, plaintiff's partner used the ladder both immediately before and immediately after plaintiff to complete work with no difficulty. Had the ladder been deficient, as plaintiff alleges, Daniel too would have likely sustained injuries as a result of such deficiencies. That the setup of the ladder was not the proximate cause of plaintiff's injuries is further substantiated by the testimony of plaintiff, David Sullivan, Christopher Koonce, and the affidavit of Abbey Daniel. These testimonies indicate that it was plaintiff's own misjudgement as to where he was on the ladder that caused him to misstep and subsequently fall off the ladder.

In addition, the Court of Appeals has recently held that an injured worker's claim under §240(1) may be dismissed "if adequate safety devices are available at the job site, but the worker either does not use or misuses them." *Robinson*, 6 N.Y.3d at 554; See Also *Montgomery v. Federal Express Corp.*, 4 N.Y.3d 805 (N.Y. 2005). In *Robinson*, the plaintiff knew he needed an 8-foot ladder in order to complete his task, and knew that such ladders were available on the premises. However, he proceeded to use a 6-foot ladder and was injured as a result of slipping off of it. The court held that "[p]laintiff's own negligent actions—choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work—were, as a matter of law, the sole proximate cause of his injuries." *Id.* at 555.

Similarly, plaintiff knew, or should have known, that the Cool Wind ladder was improperly setup and it would have to be adjusted to ensure his safety. Moreover, even if this Court assumes that the Cool Wind ladder was defective, plaintiff acknowledges that his "Little Giant" ladder was on the premises and available for him to use, but that he used the Cool Wind ladder because it was already there and setup. As previously noted, he had used his own ladder to install two other cameras earlier in the day. Plaintiff also concedes that he was under no immediate time restraint to install the camera which would have prevented him from retrieving his ladder. Thus, despite having the opportunity to either properly adjust the Cool Wind ladder or retrieve his own, plaintiff proceeded to use the improperly positioned ladder. The availability of adequate safety devices (his own ladder), coupled with his own negligent use of the Cool Wind ladder make plaintiff, as a matter of law, the sole proximate cause of his injuries.

Plaintiff's final cause of action alleges that defendants' breached Labor Law §241(6) for the same reasons above, that defendants failed in their duty to provide reasonable safety measures at the worksite. Similar to §200 and §240(1), §241(6) requires owners and general contractors "to provide reasonable

and adequate protection and safety to the persons employed therein...." Labor Law §241(6). However, this section is less stringent than §240(1) in that the implementation of the rules and regulations protecting workers, as amended in 1989, is left to a commissioner. See *id.* Moreover, "a violation of Labor Law §241(6) does not constitute negligence as a matter of law resulting in absolute liability because subdivision 6 does no more than broadly provide that the work area 'provide reasonable and adequate protection and safety,'" *Bland v. Manocherian*, 66 N.Y.2d 452, 460 (N.Y. 1985) (quoting *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 160 (N.Y. 1982)), as opposed to "section 240 and the first five subdivisions of section 241 which set forth more specific requirements, where the failure to comply automatically renders the owner or contractor absolutely liable without regard to the worker's own negligence" *Manocherian* at 160; see also, *Zimmer v. Chemung County Performing Arts*, 65 NY2d 513, 521-522. Thus, "[u]nder §241(6), as contrasted with §240(1), culpable conduct of the injured person is relevant" and the comparative fault of the plaintiff should therefore be considered. *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 512 (N.Y. 1991). Because of the less stringent liability on owners and general contractors, New York courts frequently find no basis for liability under this section, while finding liability under §240(1). See *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509 (N.Y. 1991); see also *Suwareh v. State of New York*, 24 A.D.3d 380 (1st Dep't 2005). It is a logical conclusion, therefore, that a finding of no violation under §240 of the labor law would likely result in a finding of no violation under §241(6) as well, unless plaintiff can demonstrate a violation of a specific regulation promulgated by the Commissioner of Labor and such violation is applicable. See *Wells v. British Am. Dev. Corp.*, 2 A.D.3d 1141 (3d Dep't 2003). Plaintiff sufficiently demonstrates Cool Wind's violation of the New York City Industrial Code, which requires that "[w]hen in use every stepladder shall be opened to its full position and the spreader shall be locked." 12 N.Y.C.R.R. 23-1.21(e)(3). The Industrial Code was clearly violated when plaintiff used the Cool Wind ladder while in a closed position. Thus, defendants are liable under this section for plaintiff's damages, less plaintiff's comparative fault. As previously discussed, however, since plaintiff was the sole proximate cause for his injuries, he therefore assumes complete responsibility, or 100% fault, for all damages.

In sum, plaintiff's accident falls outside the parameters which the legislator intended to protect through its enactment of the labor law worksite safety provisions. These provisions place ultimate responsibility on the owner and general contractor in an effort to protect worker safety by holding accountable owners and general contractors for failing to provide certain protections in connection with the dangerous business of construction. Here,

the evidence indicates that it was solely through the negligence of plaintiff that he fell and sustained injuries. Plaintiff's contention that defendants are liable because of the impropriety of the ladder's setup is meritless as the aforestated analysis clearly indicates that it was solely plaintiff's own misjudgments and neglect that caused his injuries. Therefore, although the positioning of the ladder was in violation of the New York City Industrial Code, this violation was in no way a proximate cause of plaintiff's injuries, and as such neither 37th Avenue Associates nor Cool Wind should be held accountable for such injuries.

Accordingly, because plaintiff was the sole proximate cause of his injuries, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: Jamaica, New York
July 17, 2006

JOSEPH P. DORSA, J.S.C.