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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES  
Justice

PART 17

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RAMON SUAREZ,  
Plaintiff,

Index No.:11190/98  
Motion Date: 6/21/00  
Motion Cal. No.: 40

-against-  
127-14 WILLETS POINT BLVD. REALTY CORP.,  
Defendant.

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127-14 WILLETS POINT BLVD. REALTY CORP.,  
Third-Party Plaintiff,

-against-  
HAN MI AUTO REPAIRS, INC.,  
Third-Party Defendant.

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The following papers numbered 1 to 19 read on this motion by defendant and third-party defendant for an order granting summary judgment in their favor and cross-motion by plaintiff for an order granting partial summary judgment pursuant to CPLR§3212.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Affidavit.....	5-7
Notice of Cross-Motion-Affirmation-Affidavit-Exhibits.....	8-12
Affirmation in Opposition.....	13-15
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Reply Affirmation.....	16-17

Upon the foregoing papers it is ordered that the motion for summary judgment by defendant and third-party defendant is granted for the following reasons:

Plaintiff, a mechanic, employed by Esther Used Auto Parts, was instructed by third-party defendant to measure the ceiling of an auto repair shop located at 127-26 Willets Point Blvd.. While plaintiff was standing on a ladder to reach the area needed to be measured, he fell as he reached to take the measuring tape from a co-helper and the ladder shifted. As a result of this fall, plaintiff allegedly sustained serious and permanent injuries. Consequently he brought the instant

action against defendant 127-14 Willets Point Blvd., the owner of the premises wherein plaintiff fell. Plaintiff has asserted liability based on violations of Labor Law §240 (1), § 241(6) and §200 and common law negligence. Defendant now moves for summary judgment in its favor and dismissal of the complaint.

Labor Law § 240(1) imposes a non-delegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for the protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately caused by that failure" (Jock v Fien, 80 N.Y.2d 965, 967, ). Although the reach of Labor Law § 240(1) is not limited to work performed on actual construction sites (*see*, Joblon v Solow, 91 N.Y.2d 457), in order to be entitled to the protection of the statute, a plaintiff must establish that he was performing work during "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*see*, Martinez v City of New York, 93 N.Y.2d 322, 325).

Thus it has been held that an electrician who fell from a ladder while replacing a lightbulb in a malfunctioning lightpole in a parking lot was not entitled to recover under Labor Law § 240(1) (*see*, Manente v Ropost, Inc., 136 AD2d 681, 524 N.Y.S.2d 96). More pertinently, it has been held that plaintiff's fall while measuring steam traps located at a public school was not an enumerated activity protected under Labor Law 240 (1). Hernandez v. The Board of Education of City of New York, 264 AD2d 709,(2nd Dept. 1999 ). Finally, a plaintiff injured during work that is merely investigatory and to be completed prior to the performance of any repair is not a person protected under Labor Law 240 (1). Martinez v. City of New York, 93 NY2d 322 (1999).

In the instant case, plaintiff was attempting to take measurements for the installation of fluorescent lights. It is undisputed that the measuring was a separate action merely in preparation for the installation, which was to take place at a later time. Moreover, there was no construction, repair or any other activity covered by Labor Law § 240(1) going when plaintiff fell. Finally, the Court of Appeals only last year stated that the "integral and necessary part" test "improperly enlarges the reach of the statute beyond its clear terms" (Martinez v City of New York, supra at 326 ), thereby calling into question the continued viability of the test. Consequently, plaintiff was not performing work covered by Labor Law § 240(1) at the time of his fall and summary judgment in defendant's favor is appropriate. Regarding plaintiff's claim under § 241(6) of the Labor Law, defendant argues that plaintiff was not engaging in protected activities at the time of the incident. Section 241 (6) of the Labor Law imposes strict liability on owners and their agents for injuries that occur to workers irrespective of the owner's or agent's control or supervision of the work site where the work was performed during

construction, excavation or demolition (*see*, Mosher v State of New York, 80 NY2d 286) and where the defendants violated a rule or regulation that sets forth a specific standard of conduct

(see, Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 at 501-502). Here, since plaintiff has failed to demonstrate that he was working at a site where construction, demolition, or excavation was being performed his claim under section 241 (6) must fail. Accordingly, summary judgment is granted in defendant's favor and plaintiff's claims under this section are dismissed.

Pursuant to Labor Law § 200, an owner is subject to liability only if it is shown to have exercised a certain degree of supervisory control over the worker's activities (see, e.g., Lombardi v Stout, 80 NY2d 290, 295). Here, since there was no evidence indicating either that defendant had any control over plaintiff's work, or even any involvement in the day-to-day operations of the auto repair shop, plaintiffs' claim against it under section 200 should be dismissed. Similarly, plaintiffs' claims against defendant under common-law negligence must be dismissed. Plaintiffs have not produced any evidence indicating that defendant knew that the ladder was defective or dangerous.

In light of the above dismissal of all claims in plaintiff's complaint, there is no reason to address plaintiff's cross-motion.

**Dated: June 26, 2000**

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**ORIN R. KITZES, J.S.C.**