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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Benish

- v -

McDonalds Corp

INDEX NO. 103899-08

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance

FILED
MAR 12 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/9/10

EMILY JANE GOODMAN J.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

STEVEN G. BENISH,

Plaintiff,

-against-

Index No. 103899/08

McDONALD'S CORPORATION, PAR TECHNOLOGY CORPORATION, ROBERT SANDLER, SUSAN CAROL KARMIN, as EXECUTRIX of the ESTATE of FRED KARMIN and INDIVIDUALLY, FRANCHISE REALTY INTERSTATE CORPORATION, FRANCHISE REALTY INTERSTATE CORPORATION d/b/a McDONALD'S RESTAURANTS, ROBERT SANDLER and SUSAN CAROL KARMIN, either as EXECUTRIX of the ESTATE of FRED KARMIN or INDIVIDUALLY, d/b/a McDONALD'S RESTAURANT, FLYNN MEYER KISSENA, INC. (previously named as ABC CORPORATION, a fictitious name), d/b/a McDONALD'S RESTAURANT, and JOHN DOE, the name being fictitious as this party's real name and identity are currently unknown to Plaintiff, d/b/a McDONALD'S RESTAURANT,

Defendants.

----------X

Emily Jane Goodman, J.S.C.:

Motions with sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, defendants McDonald's Corporation and McDonald's Corporation as successor in interest to Franchise Realty Interstate Corporation and Franchise Realty Interstate Corporation d/b/a McDonald's Restaurant (McDonald's) and Flynn Meyer Kissena, Inc. (Flynn Meyer) move, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint for failure to state a cause of action. In motion sequence number 003,

defendant Flynn Meyer moves, pursuant to CPLR 3211 (a) (8), for dismissal of the complaint as against it, on the basis that the court has no personal jurisdiction over it.[1]

BACKGROUND

This action arises out of an accident that occurred within the McDonald's restaurant located at 72-69 Kissena Boulevard, Flushing, New York on March 28, 2005. Plaintiff, a computer networking technician then employed by non-party Prime Communications, Inc. (Prime), was installing cable above the dropped ceiling in the kitchen, when the A-frame ladder on which he was standing slipped, and he was injured when he attempted to prevent his falling to the floor by hanging from the ceiling by his arm and shoulder. He managed with his foot to get the ladder under him again, and he descended the ladder without further incident. Plaintiff alleges that the ladder was approximately six to eight feet high, and the ceiling approximately 10 to 12 feet high. According to plaintiff, the kitchen floor was greasy, and appeared to have been greasy for a considerable length of time.

At the time of his accident, plaintiff was a resident of Iowa. His employer, Prime, worked out of Elkhorn, Nebraska.

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[1]Although Flynn Meyer's notice of motion states that Flynn Meyer moves only with respect to CPLR 3211 (a) (8), in its motion papers, Flynn Meyer argues for dismissal pursuant to CPLR 3211 (a) (5), expiration of the applicable statute of limitations.

According to plaintiff, defendant PAR Technology Corporation (PAR) was the general contractor for the work of installing new hardware and software to upgrade the cash register and inventory systems at McDonald's restaurants around the country, including the one at issue here. Allegedly, PAR designed and built the hardware and software, and subcontracted the work of installing them in McDonald's restaurants to Prime. Plaintiff states that he worked after regular business hours, when the restaurant was closed to the public. His accident occurred between 2 and 3 A.M.

Plaintiff maintains that McDonald's, or an entity with authority to contract for all McDonald's franchises, contracted with PAR to install the new hardware and software in its restaurants. Plaintiff contends that Flynn Meyer was the exclusive occupant of the premises, and that, as lessee, it was either the owner, or the statutory agent of the owner, at the time of plaintiff's accident.

McDonald's and Flynn Meyer counter that neither of them was the owner of the premises, and that neither of them had any involvement in the day-to-day operation of the restaurant. According to David Bartlett, McDonald's managing counsel, McDonald's did not own or operate the business at the premises (Bartlett 4/18/08 Aff., ¶ 3-4). Rather, Flynn Meyer owned and operated the restaurant pursuant to the terms of a franchise agreement dated May 20, 1995 (*id.*, ¶ 12). According to Bartlett,

McDonald's also did not contract with PAR for the work which plaintiff was doing (Bartlett 10/30/08 Aff., ¶ 3). Edward Flynn, the president of Flynn Meyer, attests that, on March 28, 2005, Flynn Meyer operated the McDonald's restaurant on the premises, but it did not own the premises or the ladder plaintiff used, did not supply the ladder, and did not supervise or direct plaintiff's work (Flynn 11/17/08 Aff., ¶¶ 2-6).

In a sur-reply affirmation, counsel for plaintiff submits an unsworn letter, dated April 9, 2008, of Joseph Macri, Esq., counsel for non-moving parties Robert Sandler, Susan Carol Karmin (individually, and in her capacity as the Executrix of the Estate of Fred Karmin) and the Estate of Fred Karmin, who contends that there are actually two parcels, not one, at the location, one belonging to Franchise Realty Interstate Corporation (McDonald's), and the other to Beverage Wagon, Inc. However, since this letter is unsworn, it is inadmissable as evidence, and does not raise an issue of fact concerning the ownership of the property and business located at 72-69 Kissena Boulevard, Flushing, New York.

DISCUSSION

Flynn Meyer's Motion to Dismiss Pursuant to CPLR 3211 (a) (5) (Motion Sequence Number 003)

Plaintiff's accident occurred on March 28, 2005. As set forth in CPLR 214 (5), the statute of limitations for personal injury actions is three years. The original summons and

complaint in this matter were filed March 17, 2008. The named defendants in the original caption included the fictitious names of "ABC Corporation ... d/b/a McDonald's Restaurant" and "John Doe ... d/b/a McDonald's Restaurant." In June 2008, plaintiff moved by order to show cause to amend his summons and complaint to substitute Flynn Meyer for the ABC Corporation defendant, which motion was granted by Decision and Order dated June 26, 2008. Plaintiff filed the amended summons and complaint on June 27, 2008.

Flynn Meyer moves to dismiss the complaint as against it on the bases that plaintiff's original complaint was jurisdictionally defective, and thus, that the action commenced as against Flynn Meyer on June 27, 2008 was time-barred.

CPLR 1024 ("Unknown parties") provides:

> A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.

To be effective under CPLR 1024, "a summons and complaint must describe the unknown party in such a manner that the 'Jane Doe' would understand that she is the intended defendant by a reading of the papers. ... An insufficient description subjects the 'Jane Doe' complaint to dismissal for

being jurisdictionally defective" (*Bumpus v New York City Transit Authority*, 66 AD3d 26, 29, 30 [2d Dept 2009]; *see also Carmer v Odd Fellows*, 66 AD3d 1435, 1436 [4th Dept 2009] [summons in "John Doe" form is jurisdictionally sufficient "only if the actual defendants are 'adequately described and would have known, from the description in the complaint, that they were the intended defendants,'" quoting *Lebowitz v Fieldston Travel Bureau*, 181 AD2d 481, 482 (1st Dept 1992)]; *Olmsted v Pizza Hut of America*, 28 AD3d 855, 856 [3d Dept 2006] ["Under CPLR 1024, the description of the unknown party must be sufficiently complete to fairly apprise that entity that it is the intended defendant"]).

In addition, a plaintiff must "exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts, [be] unable to do so" (*Bumpus*, 66 AD3d at 29-30; *see also Goldberg v Boatmax://, Inc.*, 41 AD3d 255, 256 [1st Dept 2007] [section 1024 relief denied because plaintiff failed to demonstrate "that he conducted a diligent inquiry into the actual identities of the intended defendants before the expiration of the statutory period"]; *Hall v Rao*, 26 AD3d 694, 695 [3d Dept 2006] ["timely efforts" must be made]; *Justin v Orshan*, 14 AD3d 492, 492-493 [2d Dept 2005] ["timely efforts" must be made]; *Opiela v May Industries Corp.*, 10 AD3d 340, 341 [1st Dept 2004] [plaintiff must make "genuine effort ... in a timely manner"]; *Tucker v Lorieo*, 291 AD2d 261,

261 [1st Dept 2002] ["genuine efforts" must be made prior to the running of the statute of limitations]; *Luckern v Lyonsdale Energy Limited Partnership*, 229 AD2d 249, 253 [4th Dept 1997] ["genuine efforts" must be made; "(a)bsent evidence that 'timely efforts' were made," plaintiff not entitled to use procedural mechanism provided by section 1024; a showing of "diligent inquiry" to ascertain identity of true party required]).

On March 28, 2008, plaintiff's original summons and complaint were served on "ABC Corporation d/b/a McDonald's Restaurant" by personal service upon the manager, Ramone Ildefonso, of the McDonald's restaurant located at "72-69 Kissena Blvd. Flushing, N.Y. 11367." The complaint clearly states that the restaurant wherein the accident occurred was located at "72-69 Kissena Boulevard, Flushing, County of Queens, State of New York 11367" (Complaint, ¶ 11, among other references).

In accord with these standards, this court, by Decision and Order dated June 26, 2008, granted plaintiff leave to amend his complaint to substitute Flynn Meyer as a defendant in place of ABC Corporation d/b/a McDonald's Restaurant. That decision was correct. Plaintiff's counsel made the requisite showing that Flynn Meyer was timely served and sufficiently apprised that it was the intended defendant. Flynn Meyer, who defaulted in opposing plaintiff's leave to amend his complaint, essentially seeks to reargue the court's determination.

The June 26 Decision and Order was correct for the following reasons. In his original complaint, plaintiff alleged that: ABC Corp. d/b/a McDonald's, "as owner[] or agent[] of the owners, erected, constructed, owned, operated, managed, maintained or controlled a McDonald's restaurant at the premises" (Complaint, ¶ 17); ABC Corp. d/b/a McDonald's contracted with PAR to "provide, replace or alter certain hardware and software systems and the network cable wiring to accompany them in various McDonald's restaurant retail locations ..., including at the premises," and that the work benefitted "these owners" (*id.*, ¶ 18); with the "knowledge, consent and authority of, and pursuant to the contract with ... ABC Corp., as owner[] or agent[] of the owners," PAR contracted with Prime to install the wiring and cables (*id.*, ¶ 19); the manager of ABC Corp. d/b/a McDonald's restaurant was present while plaintiff performed his work (*id.*, ¶ 28); and ABC Corp. d/b/a McDonald's provided the ladder that plaintiff used (*id.*, ¶ 32).

McDonald's has attested that Flynn Meyer owned and operated the restaurant pursuant to a franchise agreement (Bartlett 4/18/08 Aff., ¶ 12). Flynn Meyer avows that it did not own the premises, but did operate the restaurant there (Flynn 11/17/08 Aff., ¶¶ 2-6). The complaint provided the specifics of the date, time, place, and circumstances of plaintiff's accident, as well as the claims alleged. Among other things, given the

explicit allegations in paragraphs 17 and 28 concerning ABC Corp. d/b/a McDonald's operation of the restaurant, the complaint adequately described ABC Corp. d/b/a McDonald's, such that Flynn Meyer should have known, from the description in the complaint, that it was the intended defendant.

With respect to the requirement that plaintiff use diligent, timely efforts, prior to the expiration of the statute of limitations, to ascertain the true identity of the intended defendant, plaintiff, in his counsel's affirmation in support of his order to show cause, provides a chronology of dates and actions taken, which establishes satisfaction of this criteria.

Prior to February 12, 2008, plaintiff's counsel was contacted by plaintiff's Iowa workers' compensation firm concerning possible claims in New York arising from the accident. Plaintiff's counsel thereafter requested, and received, the Iowa firm's workers' compensation records, but "there was nothing in them to disclose the specific address where this incident occurred. We knew it was at a McDonald's but we didn't know specifically where, other than 'in Queens'" (Gruber 6/23/08 Affirm. in Support of Order to Show Cause, ¶¶ 12, 14). To rectify this factual void, the Iowa counsel contacted plaintiff's employer and discovered the actual address (*id.*, ¶ 14). Further inquiry, on February 12, 2008, failed to disclose whether McDonald's or a franchisee operated the restaurant (*id.*, ¶¶ 15,

16).

In "early February," plaintiff's counsel requested that a title company search for the identity of the owner of record of the property on the date of the accident (*id.*, ¶ 17). The title company responded with an August 13, 1979 Indenture from Franchise Realty Interstate Corporation, an Illinois corporation having its principal place of business at 1 McDonald's Plaza, Oakbrook, Illinois, as grantor, to Fred Karmin and Robert Sandler, who then resided in Howard Beach, Queens, and who were tenants in common owners of the property, as grantees (*id.*, ¶ 19). Because the deed identified Karmin and Sandler as the owners of record, and because the address of Franchise Realty was at McDonald's corporate headquarters, plaintiff's counsel concluded that Karmin and Sandler were McDonald's franchise owners and that Franchise Realty was a McDonald's "subsidiary that transfers land to prospective franchise owners so that franchises of McDonald's can operate on that land" (*id.*, ¶ 20).

Plaintiff then attempted to verify Karmin and Sandler's current addresses, but postal returns to the Howard Beach postmaster indicated that neither person was known at the address given on the deed (*id.*, ¶ 21).

On February 27, 2008, plaintiff's counsel contacted an asset search firm to discover the addresses of Karmin and Sandler. He learned that Karmin was deceased and that Sandler

had moved to Florida (*id.*, ¶ 22).

Through another service, he found that Susan Carol Karmin was Karmin's executrix, and a co-owner of the property with Sandler (*id.*, ¶¶ 22-23). He also discovered that Ms. Karmin had moved to Melville, New York, and had an additional address in Florida (*id.*, ¶ 24).

On March 6, 2008, plaintiff's counsel asked his court service provider to search the Queens County Clerk's Office for any corporations, partnerships, sole proprietorships and individuals doing business as McDonald's at the address. No such business was found (*id.*, ¶ 25).

Accordingly, the June 26, 2008 Decision and Order correctly determined that plaintiff exercised timely, diligent, and genuine efforts to discover Flynn Meyer's identity prior to the running of the statute of limitations.

Accordingly, the court having previously found that plaintiff's original complaint was jurisdictionally sound, and that plaintiff exercised diligent and timely efforts to ascertain the true identity of the entity sued as ABC Corp. d/b/a McDonald's at the proper address, Flynn Meyer's motion (motion sequence number 003) to dismiss the complaint as against it is denied.

McDonald's and Flynn Meyer's Motion to Dismiss Pursuant to CPLR 3211 (a) (7) (Motion Sequence Number 002)

When determining a motion to dismiss pursuant

> to CPLR 3211 (a) (7), the pleading must be afforded a liberal construction, the facts as alleged in the complaint are accepted as true, the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory [interior citations omitted]

(*Uzzle v Nunzie Court Homeowners Association*, 55 AD3d 723, 724 [2d Dept 2008]; *see also 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002] [court's task "is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law' (citation omitted)"]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964] ["However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege whatever can be implied from its statements by fair and reasonable intendment' (interior quotation marks and citation omitted)"]).

In his amended complaint, plaintiff alleges that McDonald's and Flynn Meyer, as owners or agents of the owner, "owned, operated, managed, maintained or controlled a McDonald's restaurant at the premises" (Amended Complaint, ¶¶ 17, 22), and contracted with PAR to "provide, replace or alter certain hardware and software systems and the network cable wiring to accompany them," which work benefitted McDonald's and Flynn Meyer

as owners (*id.*, ¶ 18). Plaintiff also asserts that, even though McDonald's and/or Flynn Meyer's manager was present while plaintiff was working (*id.*, ¶ 28), and provided the ladder on which plaintiff performed his duties (*id.*, ¶ 32), McDonald's and Flynn Meyer breached their nondelegable duties under Labor Law § 240 (1) by failing to properly secure the ladder, failing to ensure that the ladder remained steady and erect, and failing to provide "any safety devices to the ladder" (*id.*, ¶¶ 40, 42, 46) According to plaintiff, these failures were a "substantial factor in causing plaintiff's injuries" (*id.*, ¶¶ 41, 43, 45, 47). Plaintiff contends that McDonald's and Flynn Meyer, as owners or agents of the owner, and "for whose benefit the work was performed," are strictly liable to plaintiff for his injuries (*id.*, ¶ 54). Plaintiff further maintains that McDonald's and Flynn Meyer's failure to provide a safe, non-slippery area wherein plaintiff could work was a violation of Labor Law §§ 200, 240 (1), and 241 (6). Defendants move to dismiss the Labor Law §§ 200, 240 (1), and 241 (6) claims.

Labor Law § 240 (1) requires owners, when workers are engaged in the erection, demolition repairing, altering, painting, cleaning or pointing of a building, "to furnish or erect, or cause to be furnished or erected" safety devices, such as ladders, "which shall be so constructed, placed and operated as to give proper protection to a person so employed." "The

statute is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices" (*Ortega v Puccia*, 57 AD3d 54, 58 [2d Dept 2008]). "The duties articulated in Labor Law § 240 are nondelegable, and liability is absolute as to the ... owner when its breach of the statute proximately causes injuries" (*ibid.*). Since the duty is nondelegable, "[i]t does not require that the owner exercise supervision or control over the worksite before liability attaches" (*Gordon v Eastern Railway Supply*, 82 NY2d 555, 560 [1993]). Rather, in order to prevail on a section 240 (1) claim, a plaintiff must establish both that the statute was violated, and that the violation was a proximate cause of his accident (*see Forschner v Jucca Co.*, 63 AD3d 996, 997 [2d Dept 2009]).

McDonald's and Flynn Meyer fail to meet their burden on this CPLR §3211 motion to dismiss to demonstrate that the Labor Law claims must be dismissed as a matter of law. Even if affidavits could be considered as documentary evidence, McDonald's relies on the affidavit of Bartlett (McDonald's Managing Counsel) who has no personal knowledge of the facts of the case. Further, the affidavit of Flynn Meyer, attached to the motion sequence 003, is conclusory.

Under section 240 (1), the term "owner" includes owners in fee (*Gordon v Eastern Railway Supply*, 82 NY2d at 560), as well as "a 'person who has an interest in the property and who

fulfilled the role of owner by contracting to have work performed for his benefit' [citation omitted]" (*Zaher v Shopwell, Inc.*, 18 AD3d 339, 339 [1st Dept 2005]; *see also Lynch v City of New York*, 209 AD2d 590, 591 [2d Dept 1994] ["owner" includes "those entities with interests in the property which have the right, as a practical matter, to hire and fire the subcontractors and to insist that proper safety practices are followed"]; *Frierson v Concourse Plaza Associates*, 189 AD2d 609 [1st Dept 1993] [same]).

Under certain circumstances, a lessee might also be subject to Labor Law § 240 (1) (*see Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000] ["The statute (Labor Law § 240 [1]) may also apply to a lessee, where the lessee had the right or authority to control the work site"]; *Tate v Clancy-Cullen Storage Co.*, 171 AD2d 292, 295 [1st Dept 1991] ["A lessee in possession is deemed an 'owner' or 'agent' of the owner within the meaning of (section 240 [1]) and will also be cast in liability for any accident resulting from a violation of the nondelegable duties which the statute imposes"]).

McDonald's cannot rely on the Indenture, dated August 13, 1979, submitted for the first time in reply, whereby Franchise Realty Interstate Corporation sold its interest in a certain property to Fred Karmin and Robert Sandler, to support its contention that it was not the owner of the property where the

accident occurred (Sjoquist 6/19/09 Reply Affirm., Ex. A).[2] In addition to the fact that it was submitted for the first time in reply, the metes and bounds recorded in the Indenture are not the same as those set forth in the Lease which forms a part of the Franchise Agreement between McDonald's and Edward and Leona Flynn (*id.*, Ex. B). Moreover, the Indenture specifically provides that "the property conveyed herein shall not be used for any restaurant purpose whatsoever for a period of twenty (20) years of the date hereof [i.e., August 13, 1979]." The Lease which is part of the Franchise Agreement, dated May 20, 1995, provides explicitly that "Tenant will use and occupy the Premises solely for a McDonald's Restaurant" (Lease, ¶ 2.04).[3]

Additionally, McDonald's cannot rely on the Franchise Agreement, as it was submitted for the first time in reply. Moreover, although McDonald's cites Article 4 of the Franchise Agreement which requires Flynn Meyer to maintain the restaurant,

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[2]The 1979 Indenture and 1995 Franchise Agreement were first submitted in McDonald's and Flynn Meyer's reply papers (*see* Sjoquist 6/19/09 Reply Affirm., Exs. A & B).

[3]The Lease, which identifies McDonald's as the "Landlord," also provides that the "premises" leased include the parcel described in the metes and bounds, as well as "all buildings and improvements located on the real estate" (*id.*, ¶ 2.01). The "Tenant" was also prohibited from making any alteration of the premises "without ... obtaining the prior written consent of Landlord" (*id.*, ¶ 4.03). Paragraph 7.01 of the Lease grants "Landlord or any authorized representative of Landlord [permission to] enter the Premises at all times during reasonable business hours for the purpose of inspecting the Premises."

the Franchise Agreement also provides that part of the "essence of this Franchise" is "the establishment and maintenance of a close personal working relationship with McDonald's in the conduct of [the franchisee's] McDonald's restaurant business" (Franchise Agreement, ¶ 1 ["Nature and Scope of Franchise"] [c]). McDonald's committed to communicating to the franchisee "its know-how, new developments, techniques and improvements ... which are pertinent to the operation of a restaurant using the McDonald's System" (*id.*, ¶ 3 ["General Services of McDonald's"]). In addition, McDonald's agreed to provide its franchisee with "business manuals prepared by McDonald's for use by franchisees" (*id.*, ¶ 4 ["Manuals"]). These manuals included "'required' operations procedures" (*id.*, ¶ 4 [a]), as well as "business practices and policies" (*id.*, ¶ 4 [d]). McDonald's required its franchisee to enroll "himself and his managers, present and future, at Hamburger University" for "basic and advanced instruction for the operation of a McDonald's System restaurant" (*id.*, ¶ 6 ["Training"]). The Franchise Agreement, as well as the Lease, provided that "McDonald's shall have the right to inspect the Restaurant at all reasonable times to ensure that Franchisee's operation thereof is in compliance with the standards and policies of the McDonald's System" (*id.*, ¶ 12 ["Compliance with Entire System"]), and prohibited the franchisee from making any alterations without the prior written consent of

McDonald's (*id.*, ¶ 12 [d]).

Although it may prove to be the case that McDonald's (and or Flynn Meyer) may prevail on summary judgment, on this motion to dismiss, the facts as alleged in the complaint are accepted as true, and the plaintiff is given the benefit of every favorable inference. The two affidavits submitted in support of the motion to dismiss the complaint are insufficient to utterly refute plaintiff's factual assertions that McDonald's and Flynn Meyer were an owner or an agent of the owner within the intendment of Labor Law § 240 (1) at the time of plaintiff's accident, and thus, subject to liability thereunder. Therefore, the part of McDonald's and Flynn Meyer's motion which seeks to dismiss plaintiff's Labor Law § 240 (1) claim is denied.

Labor Law § 241 (6), by its very terms, imposes a *nondelegable* duty of reasonable care upon owners and contractors "to provide reasonable and adequate protection and safety" to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed [emphasis in original]. *Rizzuto v L.A. Wenger Contacting Co., Inc.*, 91 NY2d 343, 348 (1998); *see also Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 (1993). Construction work is defined in 12 NYCRR § 23-1.4 (13) as "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other

structures."

However, as defendants correctly note, a "plaintiff asserting a cause of action alleging a violation of Labor Law § 241 (6) must allege that a specific and concrete provision of the Industrial Code was violated ... and that the violation proximately caused his or her injuries [internal citations omitted]." *Rosado v Briarwoods Farm, Inc.*, 19 AD3d 396, 399 (2d Dept 2005).

Here, plaintiff has failed to allege any specific Industrial Code provisions whatsoever, and therefore the Labor Law § 241 (6) claim is dismissed with leave to replead.

"Labor Law § 200 is a codification of the common-law duty imposed upon an owner or general contractor to provide construction workers with a safe work site" (*Perrino v Entergy Nuclear Indian Point 3, LLC*, 48 AD3d 229, 230 [1st Dept 2008]; *see also Buckley v Columbia Grammar & Preparatory*, 44 AD3d at 272). Plaintiff has alleged that the accident was caused, at least in part, by the greasy and slippery condition of the kitchen floor on which the ladder rested (Amended Complaint, ¶¶ 36, 63, 68, 70).

When a section 200 claim is alleged based on a dangerous condition, e.g., the greasy, slippery floor, a plaintiff must show that the defendant "caused or created the dangerous condition, or had actual or constructive notice of the

unsafe condition of which plaintiff complains" (*Arrasti v HRH Construction LLC*, 60 AD3d 582, 583 [1st Dept 2009]; *see also Baillargeon v Kings County Waterproofing Corp.*, 60 AD3d 881, 881 [2d Dept 2009]). This plaintiff has done (*see* Amended Complaint, ¶¶ 67 [notice], 69 [notice], 70 [creation]). Therefore, the part of McDonald's motion which seeks dismissal of plaintiff's section 200 claim is denied.

Plaintiff's fourth cause of action alleges that McDonald's and PAR negligently hired, supervised and trained their employees. None of the parties has addressed this particular claim. Therefore, the court shall not consider it in determining this motion.

CONCLUSION

According, it is

ORDERED that the part of McDonald's Corporation as successor in interest to Franchise Realty Interstate Corporation and Franchise Realty Interstate Corporation d/b/a McDonald's Restaurant and Flynn Meyer Kissena, Inc.'s motion (motion sequence number 002) which seeks dismissal of plaintiff's Labor Law § 241 (6) claim is granted with leave to replead; and it is further

ORDERED that the part of McDonald's Corporation as successor in interest to Franchise Realty Interstate Corporation and Franchise Realty Interstate Corporation d/b/a McDonald's

Restaurant and Flynn Meyer Kissena, Inc.'s motion which seeks dismissal of plaintiff's Labor Law §§ 200 and 240 (1) claims is denied; and it is further

ORDERED that Flynn Meyer Kissena, Inc.'s motion (motion sequence number 003) for dismissal of the complaint as to it is denied; and it is further

ORDERED that the remainder of the action shall continue.

This Constitutes the Decision and Order of the Court.

Dated: March 9, 2010

ENTER:

J.S.C.

EMILY JANE GOODMAN

FILED

MAR 12 2010

NEW YORK
COUNTY CLERK'S OFFICE