STATE OF NEW YORK
SUPREME COURT **COUNTY OF GREENE**

ERIC STRINGER,

Plaintiff,

-against-

Index No.: 04-0029
RJI No.: 19-04-1487

BARBARA MUSACCHIA, Individually and as Trustee of the John Musacchia Residual Trust B-1 and John Musacchia residual trust B-1,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery for injuries sustained when the base of a ladder kicked out, causing him to fall. Defendant has moved for summary judgment dismissing the complaint on the grounds that there was no active negligence by defendants and that plaintiff was an uncompensated volunteer not entitled

to the protection of Labor Law §§ 200, 240 or 241. Plaintiff has cross moved for summary judgment on the issue of liability pursuant to Labor Law § 240 (1).

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept

1995]).

Plaintiff was injured while building an implement shed on a 400+ acre farm in the Catskill mountains which was owned by the defendant trust. He was in the process of placing a rafter on the shed when the base of the ladder upon which he was working slipped or kicked out, causing the ladder and plaintiff to fall. It is uncontroverted that plaintiff was a friend of John Musacchia, the son of the defendant trustee, and was not expecting to be paid any monetary compensation for his work. Defendants therefore contend that he was a volunteer and not entitled to the protections of the Labor Law. Indeed, it has been consistently held that a friend or neighbor who renders casual assistance in construction without any compensation is not covered by the protections of Labor Law §§ 200, 240 or 241 (see Whelen v Warwick Valley Civic and Social Club, 47 NY2d 970 [1979]; Curatolo v Postiglione, 2 AD3d 480 [2d Dept 2003]; Howerter v Dugan, 232 AD2d 524 [2d Dept 1996]; Lee v Jones, 230 AD2d 435 [3d Dept 1997]).

However, the uncontroverted facts herein do not lead to the conclusion that plaintiff was a mere casual, uncompensated volunteer, even though there was no agreement for or expectation of monetary compensation. Plaintiff was self employed as a construction contractor. He was also an avid hunter and champion archer. The Musacchia family owned a business making and selling hunting and archery equipment and supplies. They also owned the subject farm, and each spring, John Musacchia would go on a turkey hunting trip at the farm. The record indicates that these were somewhat

extraordinary hunting trips, often being attended by celebrities and filmed for sportsmen's television shows. The record also indicates that the Musacchia family often covered the expenses for food for the trip. It is clear that such a hunting trip would have significant recreational value. In exchange for being invited to join the hunt, the Musacchias expected their "guests" to work on the farm when they were not hunting[1].

While plaintiff and John Musacchia were friends, having met at an archery meet several months before the hunting trip, plaintiff's initial request to be allowed to come on the hunting trip was denied. However, John Musacchia had wanted to have an implement shed built for some time. The defendant trustee would not approve the expense of having a local contractor build it for hire. Plaintiff offered to provide the labor to build the shed in exchange for being allowed to participate in the turkey hunt. John Musacchia testified that he would not have invited plaintiff but for his agreement to construct the shed. He further testified that plaintiff was primarily responsible for the design of the shed and that plaintiff instructed the other "guests" who worked on the shed. As such, plaintiff supervised and controlled the construction of the shed and acted as the substantial equivalent of a general contractor in building the shed. There is no evidence of any direction or control by defendants. Under such circumstances, plaintiff was hardly a casual assistant. The Court therefore finds that plaintiff was "fulfilling his obligation" at the time he was injured in exchange for compensation in the form of a significant

[1] Turkey hunting is allowed from sunrise to noon, leaving a large portion of the day available for other activity.

recreational opportunity, thereby bringing him within the scope of Labor Law §§ 200, 240 and 241 (see Thompson v Marotta, 256 AD2d 1124 [4th Dept 1998] [plaintiff was a covered worker when painting landlord's house in exchange for possession of the house without a security deposit and pending Department of Social Services payment of all back rent]; Fitzpatrick v Holimont Inc., 247 AD2d 715 [3d Dept 1998] [free skiing privileges constituted compensation and evidence of employment relationship]; cf. Schwab v Campbell, 266 AD2d 840 [4th Dept 1999] [plaintiff not fulfilling an obligation in exchange for some benefit]). Accordingly, defendants' motion to dismiss on the ground that plaintiff was a mere volunteer shall be denied.

The record establishes that defendants did not direct or control the work. While they owned the ladder which was the instrumentality of plaintiff's injuries, John Musacchia testified that he was not aware of any defect in the ladder and that he was never told of any defect. Such proof is sufficient to make a prima facie showing of a right to summary judgment with respect to the cause of action for ordinary negligence, as well as the cause of action pursuant to Labor Law § 200 (Jurgens v Whiteface Resort on Lake Placid, 293 AD2d 924, 926-927 [3d Dept 2002]). Plaintiff testified that the ladder was an inexpensive model which was very flexible. His testimony that it bent excessively under load is entirely conclusory and he has not offered proof that the ladder was not approved or load rated, or that it was in other than as designed and built condition. He testified that he joked with John Musacchia that he had to be careful that the ladder didn't throw him to

the ground, but there is no evidence that he notified John Musacchia of the existence of any specific defect. He has also failed to offer any probative evidence that the alleged flexibility caused the feet of the ladder to slip or kick out. Plaintiff has therefore failed to raise any triable issue of fact in opposition to the motion to dismiss with respect to common law negligence and Labor Law §200.

In order to recover pursuant to Labor Law § 241(6), plaintiff must show a violation of a regulation which imposes a specific standard, not a general one (see Lawyer v Rotterdam Ventures, 204 AD2d 878, 880-881 [3d Dept 1994]). Plaintiff's bill of particulars cites a number of regulations which were allegedly violated. However, the cited regulations apply to safety belts, harnesses, tail lines, life nets, ramps, platforms and ladders which are used as regular access between floors. None of the cited regulations are applicable, nor do they impose any specific requirement upon defendants under the circumstances herein. As such, defendants have established a right to summary judgment dismissing the Labor Law § 241 claims. Plaintiff has not addressed this issue, and clearly has not raised a triable issue of fact.

Defendants contend that there can be no liability pursuant to Labor Law § 240 (1) because the fall was unwitnessed, plaintiff has not identified any defect in the ladder, plaintiff placed the ladder himself without assistance from anyone else, and there is no proof that the ladder had to be placed in that position, citing Blake v Neighborhood Hous. Servs. of N. Y. City, (1 NY3d 280 [2003]). It is well settled that the fact that a fall is

unwitnessed does not preclude liability or an award of summary judgment on such issue (see Rivera v Dafna Constr. Co., 27 AD3d 545 [2d Dept 2006]; Ewing v ADF Constr. Corp., 16 AD3d 1085 [4th Dept 2005]; Darling v Solomon, 227 AD2d 851 [3d Dept 1996]; Macutek v Lansing, 226 AD2d 964 [3d Dept 1996]). John Musacchia testified that he was surprised to find plaintiff in the house rather than working. It was obvious to him that plaintiff had sustained a significant injury. When John Musacchia investigated the shed, he found the ladder had fallen. There is no indication that plaintiff's version of the circumstances surrounding his injury is false or fabricated, or that it contains any significant inconsistencies. As such, the fact that his fall was unwitnessed does not preclude summary judgment.

There is also no requirement that the ladder have some physical defect, as the statute also requires that ladders be properly placed. Defendant contends that because plaintiff was responsible for the placement of the ladder, plaintiff's conduct was the sole proximate cause of the fall. This issue has spawned a number of apparently inconsistent appellate decisions. For instance, the Appellate Division, Third Department, in Danton v Van Valkenburg, (13 AD3d 931 [3d Dept 2004), held that summary judgment was properly denied based upon evidence that the fall may have been caused by plaintiff's negligence in leaning too far, rather than because the ladder bent and collapsed. However, in the same year, the Appellate Division, Third Department, held that the "fact that plaintiff may have been extending or reaching from the ladder would implicate

comparative negligence, which is not a defense to a section 240(1) action. Accordingly, we conclude that plaintiff's motion for partial summary judgment should have been granted." (Gilbert v Albany Med. Cent., 9 AD3d 643, 645 [3d Dept 2004]).

Notwithstanding such inconsistencies, it appears that in order for plaintiff's conduct to constitute the sole proximate cause of a fall sufficient to take it out of the protection of the Labor Law, there must be proof that the plaintiff was misusing the ladder (see Morales v Spring Scaffolding, 24 AD3d 42, 48 [1st Dept 2005]; Morin v Machnick Bldrs., 4 AD3d 668, 670 [3d Dept 2004]). Negligence by a plaintiff in the placement of a ladder does not constitute a defense to liability (see Morin v Machnick Bldrs., 4 AD3d at 670). The Court concludes that based upon the weight of appellate authority, plaintiff's proof that the base of the ladder slipped or kicked out, causing the ladder to fall, constitutes a prima facie showing of a violation of Labor Law § 240 (1), thereby meeting his burden on the cross-motion for summary judgment of liability (see Gilbert v Albany Med. Ctr., 9 AD3d at 644; Morin v Machnick Bldrs., 4 AD3d at 670; Tavarez v Weissman, 297 AD2d 245 [1st Dept 2002]; Squires v Robert Marini Bldrs., 293 AD2d 808 [3d Dept 2002]; Smith v Pergament Enters. of S.I., 271 AD2d 870 [3d Dept 2000]).

Defendants have failed to offer any proof that plaintiff was in any sense misusing the ladder at the time of his fall nor have they raised any other triable issue of fact concerning liability pursuant to Labor Law § 240 (1).

Accordingly it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is hereby granted to the extent that the causes of action based upon common law negligence and Labor Law §§ 200 and 241 are dismissed and is otherwise denied, and it is further,

ORDERED that plaintiff's cross-motion for summary judgment of liability pursuant to Labor Law § 240 (1) is hereby granted.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiff, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
November 30 ,2006

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion, dated July 31, 2006; Affirmation of Thomas J. Johnson, Esq., dated July 31, 2006 with Exhibits A-I annexed;
Notice of Cross-Motion, undated; Affidavit of Eric Stringer, sworn to August 9, 2006; Affirmation of Ralph C. Lewis, Jr., Esq., dated August 10, 2006 with Exhibit A annexed; Reply Affirmation of Thomas J. Johnson, Esq., dated August 25, 2006 with Exhibit J annexed.