

**Morris v Kewa, Inc.**

2007 NY Slip Op 31230(U)

May 11, 2007

Supreme Court, New York County

Docket Number: 0109463/2004

Judge: Shirley W. Kornreich

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

SHIRLEY WERNER KORNREICH

J.S.C.

PART 54

Index Number : 109463/2004

MORRIS, TREVOR

vs

KEWA

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 2/1/07

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

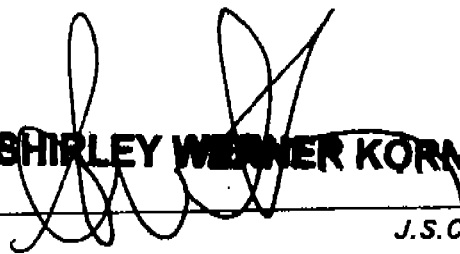
PAPERS NUMBERED
<u>1-2</u>
<u>3-4</u>
<u>5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
MAY 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

  
SHIRLEY WERNER KORNREICH  
J.S.C.

Dated: May 11, 2007

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MO... (CA... IS... )  
EC... ULL  
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FOR THE... OWING RE... ON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X

TREVOR MORRIS,

**DECISION & ORDER**

Plaintiff,

-against-

Index No.: 109463/04

KEWA, INC.

Defendant.

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KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
MAY 17 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action under Labor Law §§240(1), 241(6) and 200, Defendant moves for summary judgment dismissing the complaint and plaintiff cross-moves for summary judgment on liability.

Plaintiff was employed by Ken's Decorative Coatings, Inc., a company that provides painting services. Plaintiff was injured when he fell from a ladder while plastering a bathroom ceiling in apartment 31 ("Apartment"), located in the building at 468 Riverside Drive, New York, NY ("Building"). Plaintiff testified that, his employer, Ken Strauss, did not give him the ladder. Tr. 16-17. Plaintiff stated that he took the ladder from a storeroom in the Building's basement, that the Building superintendent let him into the storeroom, and that the superintendent told him to take whatever supplies he needed to do the job. Tr. 16-30. In describing the ladder, plaintiff said it was "shaky" and had no rubber on the bottom, only wood. Tr. 31-32. Plaintiff was ascending the ladder when it began to close, causing him to fall. Tr. 51-53. Plaintiff did not know why the ladder closed. Tr. 53.

Defendant's witness, Mark Hoffman of Hoffman Management, hired plaintiff's employer to paint the apartment where the accident occurred. Tr. 20. Mr. Hoffman testified that he did not

know whether the superintendent of the Building kept a ladder in the Building, whether the Building had ladders that were used for painting, and whether plaintiff's employer provided the ladder. Tr. 14 & 27-28. Mr. Hoffman did say that the contract with plaintiff's employer stated that it was to provide materials, but Mr. Hoffman had no personal knowledge as to the ownership of the ladder from which plaintiff fell. Tr. 21 & 27. Mr. Hoffman stated that the superintendent, Joseph Acker, was no longer employed by the Building, that his last known address was at the Building, and that his present employment was not known. Tr. 14 & 18.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make such a prima facie showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1<sup>st</sup> Dept. 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, 49 N.Y.2d, at 562. Uncontradicted facts are deemed admitted. *Costello Associates, Inc. v. Standard Metals Corp.*, 99 A.D.2d 227, 229 (1<sup>st</sup> Dept. 1984), appeal

*dismissed*, 62 N.Y.2d 942 (1984). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Plaintiff is granted summary judgment on his section 240 (1) claim, as there is no evidence to rebut plaintiff's testimony that the shaky ladder, without slip-resistant feet, closed and caused the fall. *Fernandes v. Equitable Life Assur. Soc'y of the United States*, 4 A.D.3d 214, 215 (1<sup>st</sup> Dept. 2004)(wobbly ladder caused plaintiff to lose balance). Defendant did not come forward with any admissible evidence to contradict plaintiff's testimony that the ladder was provided by the Building's superintendent and not by plaintiff's employer.

Plaintiff is also entitled to summary judgment on his section 241(6) claim due to the lack of rubber feet on the bottom of the ladder. The specific regulation upon which liability under this section is predicated is 12 N.Y.C.R.R. § 23-1.21(b)(3)(iv), which provides that a ladder shall not be used if "it has any flaw or defect of material that may cause ladder failure." The absence of rubber feet on a ladder is a violation of this safety rule. *De Oliveira v. Little John's Moving, Inc.*, 289 A.D.2d 108, 108-109 (1<sup>st</sup> Dept. 2001); *Jicheng Liu v. Sanford Tower Condominium, Inc.*, 35 A.D.3d 378 (2d Dept. 2006).

However, plaintiff is not entitled to summary judgment under section 200 of the Labor Law, which codifies the common law duty of a building owner to maintain a safe workplace. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993), citing *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 352 (1998). Implicit in this duty is the owner's obligation to control or exercise supervision over "the activity bringing about the injury to enable it to avoid or correct an

unsafe condition.” *Rizzuto v. L.A. Wenger Contr. Co., supra; accord, Perri v. Gilbert Johnson Enters., Ltd.*, 14 A.D.3d 681, 683 (2d Dept. 2005). Here, no triable issue of fact exists as to whether the defendant controlled the activity which brought about plaintiff’s injury. Plaintiff testified that on the day of the accident, he and a co-worker named Dave were the only people working in the apartment. Tr. 36. Therefore, the defendant Building owner was not in a position to supervise and control plaintiff’s work so as to cast it in liability for plaintiff’s injuries and plaintiff’s claim under section 200 is dismissed. Accordingly, it is

ORDERED that defendant’s motion for summary judgment is granted as to plaintiff’s Labor Law §200 claim, which is dismissed with prejudice, and the motion is denied in all other respects; and it is further

ORDERED that plaintiff’s cross-motion for summary judgment on liability is granted as to his causes of action under Labor Law §§ 240(1) and 241(6), and is denied as to plaintiff’s claim under Labor Law §200; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference in Part 54, Room 1227, at 111 Centre Street, New York, N.Y., on May 24, 2007, at 11 a.m.

Dated: May 11, 2007

ENTER:

*[Handwritten signature]*  
 J.S.C.  
**FILED**  
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