At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the SEP 05 2007

P R E S E N T:

HON. BRUCE M. BALTER,
Justice.

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KRZYSZTOF SZYMANSKI,
Plaintiff,

- against -

Index No. 52258/02

THE ARGO CORPORATION, THE SECOND PRESBYTERIAN CHURCH IN THE CITY OF NEW YORK, ROSSO REALTY CORP, AND CENPARK REALTY CORP.,
Defendants.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants The Argo Corporation, the Second Presbyterian Church in the City of New York, and Cenpark Realty Co. (Cenpark) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Krzysztof Szymanski.

This case arises from an accident which occurred on February 6, 2000 at a building located at 360 Central Park West in Manhattan. At the time of the accident, plaintiff was employed by non-party Rosenwach Plumbing, as a mechanics helper. His job was to build water tanks, maintain them, and fix them when they became damaged.

Plaintiff testified at his deposition that on the day of the accident, his foreman, Richard Danielewski, picked him up at approximately 8:00 or 9:00 A.M. Plaintiff said that Mr. Danielewski was also a mechanic and had the authority to direct him. Plaintiff and Mr. Danielewski drove to 360 Central Park West in order to repair the building's water tank. Plaintiff said Andy Rosenwach, the employer of plaintiff and Mr. Danielewski, gave Mr. Danielewski the order to fix the water tank. When plaintiff and his foreman arrived at the building, the building superintendent, Jacob Delacruz, took them up in an elevator to the roof. Mr. Delacruz unlocked a door to get to the roof. The water tank stood on a structure which was approximately ten feet higher than the roof. In order to access the water tank, plaintiff and Mr. Danielewski climbed up a metal ladder which was affixed to the building. Mr. Delacruz also climbed up the ladder. Plaintiff was wearing a utility belt which contained some hand tools. He did not notice any problems with the ladder.

Plaintiff and Mr. Danielewski then went back down to their van to retrieve some valves and pipes, and were again escorted back up to the roof by Mr. Delacruz. Plaintiff and Mr. Danielewski again climbed up the ladder while holding brass or copper four-inch pipes and valves. Plaintiff testified that he carried one pipe, which was "not too heavy," in his

right hand and under his right armpit, and used both hands to climb up the ladder. When plaintiff reached the third rung from the bottom of the ladder, he felt the ladder shake, lost his grip on the ladder, and fell down on the floor of the roof. Plaintiff testified that Mr. Delacruz was with plaintiff and Mr. Danielewski on the roof when the accident occurred, and that before he and his foremen began their work, Mr. Delacruz had turned off the water on the water tank.

Mr. Delacruz testified at his deposition that he was the superintendent of the subject building for the past 30 years, and that he was employed by defendant Cenpark. In order to access the water tank, he took an elevator to the roof, and then climbed up a 90 degree metal staircase which was "outside" on the "penthouse." The water tank sat upon the penthouse. The ladder is approximately nine feet high with rungs approximately three quarters of an inch in circumference. The rungs were approximately one foot apart from each other. Mr. Delacruz inspected the roof one to three times a week. In the 30 years he worked as superintendent of the building, he climbed up and down the stairs over 400 times. He said that when he had climbed the ladder in the past, it never moved. He also said that during his 30 years of employment at the building, the ladder had never been replaced.

When he saw that the water tank was leaking, he called Rosenwach, and plaintiff arrived to fix the leak. As he brought plaintiff and Mr. Danielewski up to the tank, he did not assist in bringing up any materials. He said the pipe plaintiff carried up the ladder weighed approximately 25 to 30 pounds. He also testified that plaintiff fell from the middle

of the ladder, but that he did not see plaintiff fall. After the fall, he told plaintiff he would call an ambulance, but plaintiff and Mr. Danielewski did not want one. Plaintiff subsequently commenced the instant action alleging violations of Labor Law §§ 240(1) and 200, as well as common-law negligence.[1] Defendants joined issue by service of a verified answer. After the parties were deposed, defendants made the instant motion for summary judgment.

Labor Law 240 (1)

Defendants argue that plaintiff's Labor Law § 240 (1) cause of action must be dismissed because plaintiff fell from a permanently affixed ladder. Labor Law § 240 (1) provides, in pertinent part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, 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 a person so employed."

Labor Law § 240 (1) was enacted to "prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). In order to

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[1]Defendants assert that plaintiff has alleged a violation of Labor Law § 241 (6) in his complaint. To the extent it has been alleged, it comprises the first cause of action.

accomplish this goal, the statute places the responsibility for safety practices and safety devices on owners, general contractors, and their agents who "are best situated to bear that responsibility" (*id.* at 500; *see also Zimmer v Chemung County Perf. Arts*, 65 NY2d 513, 520 [1985]). "The duty imposed by Labor Law § 240 (1) is nondelegable and . . . 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" (*Ross* at 500). Although the statute is to be construed as liberally as possible in order to accomplish its protective goals (*Martinez v City of New York*, 93 NY2d 322, 326 [1999]), "[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). "In order to recover on a claim pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident" (*Camlica v Hansson*, 40 AD3d 796, 797 [2007], citing *Blake v Neighborhood Hous. Services of New York City*, 1 NY3d 280, 287 [2003]). Further, falls from stairs or ladders which constitute normal appurtenances to a building or structure and which are not designed as safety devices to protect workers from elevation-related risks, are not covered under the statute (*see Gelo v City of New York*, 34 AD3d 636, 636-637 [2d Dept, 2006]; *Norton v Park Plaza Owners Corporation*, 263 AD2d 531, 532 [2d Dept, 1999]; *Gold v NAB Constr. Corp.*, 288 AD2d 434, 435 [2d Dept, 2001], *lv denied* 97 NY2d 611 [2002]).

In support of that branch of their motion to dismiss plaintiff's Labor Law § 240 (1) claim, defendants rely upon *Gelo v City of New York*, 34 AD3d 636, 636-637 [2d Dept 2006]), where the Supreme Court, Queens County, denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240 (1), searched the record and awarded summary judgment to the defendants. The Appellate Division, Second Department, affirmed the order of the Supreme Court, "since the permanently affixed ladder from which the injured plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect the injured plaintiff from elevation-related risks."

Here, inasmuch as plaintiff fell from a permanently affixed ladder, defendants have made a prima facie showing entitling them to dismissal of plaintiff's Labor Law § 240 (1) claim (*id.*; *see also Norton v Park Plaza Owners Corporation*, 263 AD2d 531, 532 [2d Dept, 1999] [plaintiff's Labor Law § 240 (1) claim dismissed where he fell from a fixed, permanent staircase leading to roof; staircase was a normal appurtenance to the building and was not designed as a safety device to protect plaintiff from an elevation-related risk]; *Gold v NAB Constr. Corp.*, 288 AD2d 434, 435 [2d Dept, 2001], *lv denied* 97 NY2d 611 [2002], citing *Norton*, 263 AD2d at 532][plaintiff's Labor Law § 240 (1) claim dismissed because metal steps from which he fell were a "'normal appurtenance to the [subway tunnel] and [were] not designed as a safety device to protect him from an elevation-related risk'"]; *but see Olberding v Dixie Contracting, Inc.*, 302 AD2d 574, 574-575 [2d Dept, 2003] [defendant's motion to dismiss plaintiff's Labor Law § 240 (1) claim denied where plaintiff

fell from a ladder affixed to cooling towers on the roof of a hospital where there was no evidence that ladder was defective or inadequately secured; question of fact as to whether it provided proper protection and whether the injured worker should have been provided with additional safety devices]; *Griffin v N. Y. City Transit Auth.*, 16 AD3d 202, 203 [1st Dept, 2005] [defendants' motion to dismiss plaintiff's Labor Law § 240 (1) claim denied; "issues of fact as to whether the structure from which he fell was a permanently affixed ladder which provided the sole access to his work site and therefore a 'device' within the meaning of Labor Law § 240(1) or whether it was a permanent staircase not designed as a safety device to afford protection from an elevation-related risk and therefore outside the coverage of the statute"][internal citations omitted]). Plaintiff has failed to address this branch of defendants' motion in his affirmation in opposition. Based upon the foregoing, this branch of defendants' motion is granted.

Labor Law § 241(6)

Defendants also move to dismiss plaintiff's Labor Law § 241 (6) cause of action on the grounds that plaintiff failed to allege or plead any violation of an Industrial Code. Labor Law §241(6) provides, in pertinent part, that:

> "All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code (*Ross*, 81 NY2d 494, 501-502 [1993]). "To support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the accident" (*Rivera v Santos*, 35 AD3d 700, 702 [2006], citing *Ross*, 81 NY2d at 502).

The complaint does not allege a violation of Labor Law § 241 (6). To the extent that the first cause of asserts a violation of this statute, neither the complaint nor the bill of particulars alleges a violation of an Industrial Code provision. In opposition, plaintiff does not address this branch of defendants' motion. Based on the foregoing, this branch of defendants' motion is granted.

Labor Law § 200

Defendants also move to dismiss plaintiff's Labor Law § 200 and common-law negligence claim. In support of this branch of their motion, they argue that there is no evidence that the ladder was defective, and that plaintiff's testimony that the ladder shook was made in an attempt to create a feigned issue of fact.

In opposition to this branch of the motion, plaintiff argues that a question of fact exists as to whether Mr. Delacruz, employed by defendant Cenpark, "supervised the actions resulting in [p]laintiff's injuries from beginning to end." Specifically, plaintiff asserts that Mr. Delacruz supervised him because Mr. Delacruz called him to fix the water tank, met and

spoke with plaintiff about the necessary repairs, assisted plaintiff by shutting off the water so that repairs could be made, escorted plaintiff to the roof, unlocked doors, directed plaintiff to the ladder as the only method of reaching the water tank, accompanied plaintiff to the water tank, and instructed plaintiff to bring all the items required to the main roof.

Plaintiff also argues that a question of fact exists as to whether Mr. Delacruz had actual notice of the ladder's defect based upon Mr. Delacruz' testimony that he did not carry 25 to 30-pound pipes up the ladder, coupled with plaintiff's affidavit, in which plaintiff states that after his fall, Mr. Delacruz asked him if he needed an ambulance, and said "that's why I never carry heavy stuff up that ladder, because sometimes that ladder shakes." Plaintiff argues that a jury could reasonably infer that Mr. Delacruz did not carry any "weights" on the ladder due to its defective condition.

Plaintiff also contends that a question of fact exists as to whether Mr. Delacruz had constructive notice of the ladder's defect, given the frequency with which Mr. Delacruz inspected the water tank, and Mr. Delacruz' testimony that he carried items up the ladder to the roof, some of which were heavy and some which were light. Plaintiff states that a question of fact is raised as to whether the ladder was loosely affixed and whether it shook depending on the weight which was placed on it.

This branch of the motion is also granted. "Labor Law § 200 merely codifies 'the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work'" (*Dooley v Peerless Importers, Inc.*, ___ AD3d __, 2007 NY Slip Op 4781, 3-4 [2007], quoting *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Liability for causes of action sounding in common-law negligence and

for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that plaintiff employs in his work, or who have actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). "General supervisory authority for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability" (*McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, *3 [2007]). "In order to impose liability upon it, a[n] [owner] . . . must have had the authority to control the activity bringing about the injury so as to enable it to avoid or correct an unsafe condition (*id.*).

Here, it is clear that Mr. Delacruz did not exercise the requisite control or supervision over plaintiff's work or otherwise have notice of any dangerous condition associated with the ladder. In this regard, Mr. Delacruz, the superintendent of the building, merely escorted plaintiff and his foreman to the roof and then to the water tank so they could perform their work. Nothing in the testimony cited by plaintiff, or in any of the deposition testimony of plaintiff or Mr. Delacruz, indicates otherwise. Notably, plaintiff testified that his foreman was his supervisor, who had the authority to direct his work, and that the order to fix the tank was made by plaintiff's employer, Andy Rosenwach. Further, plaintiff's testimony that Mr. Delacruz told him and his foreman to go to the roof does not constitute supervision of plaintiff's work. In any event, plaintiff testified that going to the roof was part of his normal routine when making such repairs. Moreover, the statement attributed to Mr. Delacruz in plaintiff's affidavit about the ladder shaking under heavy weight is insufficient to defeat this

branch of the motion since it contradicts the testimony of plaintiff and Mr. Delacruz regarding the events which occurred after plaintiff's fall. In this connection, when asked whether the superintendent said anything after his fall, plaintiff said "I don't remember, I don't think so." Further, when asked what he said to plaintiff while plaintiff was lying on his back after the fall, Mr. Delacruz said "I tell if I call the ambulance. They [plaintiff and his foreman] said no." Based upon the foregoing deposition testimony, the statement attributed to Mr. Delacruz by plaintiff is merely an attempt to raise a feigned factual issue designed to avoid the consequences of the earlier deposition testimony of plaintiff and Mr. Delacruz (*Tejada v Jonas*, 17 AD3d 448, 448-449 [2005]).

Nor is there evidence that Mr. Delacruz had actual notice of a defect in the ladder. Despite having climbed the ladder over 400 times in the last 30 years, Mr. Delacruz testified that the ladder never moved when he climbed it. Further, the statement attributed to Mr. Delacruz by plaintiff in his affidavit about the weight the ladder could bear cannot be credited, for the reasons noted above (*id.*).

Finally, plaintiff's contention that defendants had constructive notice of a defect in the ladder is rejected. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant's employees to discover and remedy it" (*Scoppettone v ADJ Holding Corp.*, 41 AD3d 693, *2 [2007], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Here, plaintiff fails to provide any evidence that the alleged defect in the ladder was apparent and existed for a sufficient length of time prior to accident to have permitted

Mr. Delacruz to have discovered and remedied it. As noted, Mr. Delacruz testified that he climbed the ladder frequently, and said it never shook when he did so. Moreover, contrary to plaintiff's characterization of Mr. Delacruz' deposition testimony, Mr. Delacruz did not testify that he carried both heavy and light items up the ladder. Rather, he said he just carried items that were a "few pounds." Thus, plaintiff's theory that constructive notice is established by virtue of Mr. Delacruz carrying heavy items frequently up the ladder is misplaced.

In sum, the motion of defendants for summary judgment dismissing the complaint is granted.

This constitutes the decision, order and judgment of the court.

ENTER,

J. S. C.

Bruce M. Balter