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

PRESENT: DEBRA A. JAMES Justice — PART 59

DRITAN KOKONOZI,

Plaintiff,

- v -

BETH ISRAEL MEDICAL CENTER, INC., MAXWELL KATES, INC., EAST UNION SQUARE CONDOMINIUM, and BETH ISRAEL MEDICAL CENTER,

Defendants.

Index No.: 108196/04

Motion Date: 07/24/07

Motion Seq. No.: 03

Motion Cal. No.: 003

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4, 5

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

The court shall grant plaintiff's motion for partial summary judgment on the issue of liability under Labor law 240 (1) against the Beth Israel defendants. By separate Order on Motion Sequence Number 4 the court dismissed defendants Maxwell Kates and East Union Square from this lawsuit.

It is uncontroverted that on July 19, 2002, plaintiff, while employed by non-party Harvard Maintenance, Inc., fell from a scaffold at defendant's premises at 10 Union Square East. At the time of the accident plaintiff was applying lacquer and other

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

chemicals to clean a sign attached to the building approximately 10 to 20 feet off of the ground. Plaintiff's claim is that the accident occurred when plaintiff, as directed by a supervisor, attempted to ascend up to a scaffold erected for the purpose of performing the work. Plaintiff fell backwards while using both hands to hold onto the handrails while negotiating the second step of a ladder leading up to the scaffold. Plaintiff's uncontroverted testimony is that the first step of the ladder was missing, no other safety devices were provided, and that plaintiff fell backwards when his legs became trapped within the steps of the ladder.

Defendants oppose summary judgment on the grounds that the work plaintiff was performing, metal cleaning of the sign attached to the building's exterior, was not a protected activity under Labor Law 240 (1). Recent precedent from the Court of Appeals defeats defendants' argument and supports summary judgment on liability in plaintiff's favor.

Even accepting defendants' characterization of plaintiff's work as mere metal cleaning, such work is protected under the strict liability provision of the Labor Law where there is an elevation-related hazard. As stated by the Court,

> "Cleaning" is expressly afforded protection under section 240 (1) whether or not incidental to any other enumerated activity. As a result, in Brown v Christopher St. Owners Corp. (87 NY2d 938, 939 [1996]), we did not preclude liability on the ground that the exterior window cleaning was not part of a construction, demolition, or repair

> project. Rather, we concluded that "routine, household window washing" was "not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240.".
> Further, our decisions in Joblon and Panek do not suggest that cleaning at a nonconstruction site falls outside the scope of section 240 (1) unless connected with altering. These cases dealt with the meaning of the statutory term "altering," not "cleaning." "Altering" and "cleaning" are discrete categories of activity protected under section 240 (1). Notably, in Joblon, we rejected the defendants' argument that only altering performed as part of a building construction job was covered by section 240 (1).
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> In Bauer v Female Academy of Sacred Heart (97 NY2d 445 [2002]), we allowed a section 240 (1) claim to go forward where the plaintiff fell while cleaning the exterior of a third-story window at a school. We see no reason to limit Bauer to its facts--exterior window washing of a nondomestic character--as defendants urge. While interior window washing may not routinely entail the elevation-related risks that exterior window washing almost invariably poses, assigning liability under section 240 (1) on this basis would create an arbitrary dividing line unfaithful to legislative intent. The crucial consideration under section 240 (1) is not whether the cleaning is taking place as part of a construction, demolition or repair project, or is incidental to another activity protected under section 240 (1); or whether a window's exterior or interior is being cleaned. Rather, liability turns on whether a particular window washing task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against.

Broggy v Rockefeller Group, Inc., 8 NY3d 675, 680-681 (2007) (internal citations omitted).

Based upon the reasoning of Broggy, defendants are liable here. There is no dispute that the task at issue here involved work on a sign or marquee permanently attached to the building at a height that required the use of a scaffold. The lesson of Broggy is that the determinative issue for purposes of strict

liability is not whether the cleaning is routine but whether the particular work involves an elevation-related risk. Here the plaintiff was directed to perform work on top of an elevated scaffold with a ladder leading to it, the scaffold and ladder being enumerated safety devices under the statute, and that the ladder failed to offer protection thus causing plaintiff's injuries. Such an activity is within the scope of the statute's protections. See Gregorio v Getty Petroleum Corp., 201 AD2d 278, 279 (1st Dept 1994) (accident caused by fall off ladder during installation of sign atop a lamp pole sets forth a cognizable Labor Law 240 (1) claim).

Defendants further argue that plaintiff's injuries were not "elevation-related" because plaintiff had one foot on the ground at the time of the accident. Defendants cite Vasiliades v Lehrer McGovern & Bovis, Inc. (3 AD3d 400, 401 [1st Dept 2004]) in support of their argument. Vasiliades is however distinguishable from the facts presented here as is demonstrated by other controlling authority. As stated by the Court of Appeals, "plaintiff was working on a ladder and thus was subject to an 'elevation-related risk.' The ladder did not prevent plaintiff from falling; thus the 'core' objective of section 240 (1) was not met. Accordingly, plaintiff is within the protection of the statute if his injury was proximately caused by the risk, i.e., defendant's act or failure to act as the statute requires 'was a

substantial cause of the events which produced the injury.'" Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 561-562 (1993). As further elucidated by the First Department, "[n]or does the fact that plaintiff fell only a short distance remove this incident from the purview of the statute, since falling from the bottom rung of a ladder at a construction site is the type of elevation-related risk the statute was intended to cover." Binetti v MK West Street Co., 239 AD2d 214, 215 (1st Dept 1997) (emphasis added); see also Thompson v St. Charles Condominiums, 303 AD2d 152, 154 (1st Dept 2003) ("While the absence of any appreciable height differential . . . could call into question the applicability of section 240 (1), the statute must still apply to the collapse of a scaffold . . . [t]hat it was 'only' four feet above the ground does not constitute a basis for ignoring the requirements of section 240 (1), especially when liability is based upon a defect in a protective device specifically listed in the statute."); Buckley v Radovich, 211 AD2d 652, 653-654 (2d Dept 1995).

As set forth in Binetti, the mere fact that plaintiff's fall was from the bottom of the ladder does not warrant dismissal of plaintiff's claim. Rather the inquiry is whether the accident was caused by the failure or absence of a safety device and whether the accident itself is elevation-related. See Thompson, supra. Plaintiff's uncontradicted testimony sets forth a prima

facie case that he fell due a missing step on the ladder leading up to the scaffold. Therefore plaintiff has established that the accident was elevation-related and resulted from a defective safety device designed to prevent the very accident that caused plaintiff's injuries. The Court's decision in Vasiliades is distinguishable from this case because in that case the plaintiff conceded that the ladder was in "perfect condition" and that the ladder slipped because of water on the glazed tile floor upon which the ladder was placed. Vasiliades, 3 AD3d at 401. Thus in Vasiliades there was no defective safety device and Labor Law 240 was not implicated.

Plaintiff is therefore entitled to summary judgment on its Labor Law 240 (1) claim.

The court shall grant defendants' cross-motion to dismiss the plaintiff's negligence, Labor Law 200 and 241 (6) claims as plaintiff has not demonstrated any negligence on the part of the defendants nor any predicate Industrial Code violations.

Therefore, it is

ORDERED that plaintiff's motion for summary judgment on liability is GRANTED as to the liability of defendants BETH ISRAEL MEDICAL CENTER, INC., and BETH ISRAEL MEDICAL CENTER pursuant to Labor Law 240 (1); and it is further

ORDERED that the cross-motion of defendants BETH ISRAEL MEDICAL CENTER, INC., and BETH ISRAEL MEDICAL CENTER for summary

judgment dismissing plaintiff's claims for negligence and liability under Labor Law 200 and 241 (6) is GRANTED, and the aforementioned claims are DISMISSED, and defendants' motion is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation before Mediation Part 1 on January 9, 2007 at 10:30 A.M. and if the action is not settled thereat, the parties are to attend a pre-trial conference on January 15, 2008, at 2:30 P.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013 to set a trial date.

This is the decision and order of the court.

Dated: December 06, 2007 ENTER:

J.S.C.

DEBRA

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