

**Koci v 539 W. 49St. Realty LLC**

2007 NY Slip Op 34469(U)

January 29, 2007

Supreme Court, New York County

Docket Number: 120925/03

Judge: Emily Jane Goodman

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

EMILY JANE GOODMAN

PRESENT

Index Number : 120925/2003

PART 17

KOCI, ILIR

vs

539 WEST 49ST. REALTY

Sequence Number : 001

DISMISS

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

MOTION DATE \_\_\_\_\_

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

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

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

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

*n no cross motion*

Upon the foregoing papers, it is ordered that this motion *also be ruled in*

*accordance with attached*

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

FILED

FEB - 7 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/29/07

*[Signature]*  
EMILY JANE GOODMAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

\* 2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 17

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ILIR KOZI,

Plaintiff,

Index No. 120925/03

-against-

539 WEST 49St. REALTY LLC,

Defendant.

-----X

**Emily Jane Goodman, J.:**

Defendant 539 West 49St. Realty LLC moves for summary judgment in this personal injury action. Plaintiff cross-moves for summary judgment.<sup>1</sup> Both motions are denied as untimely.<sup>2</sup> Even if the motions were timely, issues of fact exist for trial.

#### **I. Facts**

Defendant is the owner of a building located at 539 West 49<sup>th</sup> Street. Plaintiff Ilir Koci alleges he was working in the

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<sup>1</sup>Plaintiff's cross motion was brought without notice.

<sup>2</sup>The Preliminary Conference Order, dated October 21, 2004, provided that dispositive motions had to be made within 45 days of filing the Note of Issue. The Note of Issue was filed on July 18, 2005 but defendant did not move for summary judgment until approximately 90 days later. Not only did defendant not present a reasonable excuse for the late filing, but defendant erroneously asserted that the motion was timely. Had defendant presented a reasonable excuse for the late filing, the court may have excused it. However, court deadlines must have meaning, and therefore, absent good cause shown, both motions are denied as untimely.

building finishing the floors in apartment 2A, when a fire started, causing him to be severely burned.

Plaintiff claims that he had been working in the apartment for two days sanding the floor with two machines, and vacuuming and mopping, after which he commenced applying stain and polyurethane to the clean floor. In his bill of particulars, plaintiff claims that at some point, he turned on the light in the apartment, upon which "the room exploded causing a fire which consumed him." Bill of Particulars, Notice of Motion, Ex. C, ¶ 5.<sup>3</sup> Plaintiff escaped by breaking through a closed living-room window in the apartment. Upon investigation, the Fire Department could not find any cause for the fire.

Defendant asserts that plaintiff's action must be dismissed because he cannot present evidence as to the cause of the fire which is required to establish a prima facie case of negligence. Defendant also argues that plaintiff cannot provide evidence of notice on the part of defendant. Instead of demonstrating why defendant's arguments should be rejected, plaintiff maintains that his injuries were caused by defendant's violation of section 241 (6) of the Labor Law (LL), which makes owners of premises liable for violations of certain Industrial Code regulations.<sup>4</sup>

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<sup>3</sup>In his deposition, plaintiff testified that he did not know what caused the lacquer to be set on fire.

<sup>4</sup>Because defendant originally addressed plaintiff's complaint as if it were grounded solely on a theory of

## II. Discussion

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). "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).

As stated above, a party alleging a violation of the Industrial Code must show that he or she was engaged in, among other things, "construction work" when the accident occurred. LL § 241 (6). Defendant maintains that the work in which plaintiff was engaged when he was injured was not construction work, but was merely routine maintenance, taking the action out of the LL.

Whether certain work is covered under LL § 241 (6) is dependant on the definition of that term in the Industrial Code. See *Joblon v Solow*, 91 NY2d 457 (1998). Industrial Code (12

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negligence, the court asked for additional briefs concerning the application of LL § 246 (1).

NYCRR Part 23) § 23-1.4 (13) defines construction work as "[a]ll work of the types performed in the construction, erection, alteration, repair, maintenance, painting or moving of buildings or other structures." By its very language, this section is not limited only to a common understanding of the meaning of "construction work" (regardless of the general language of LL § 241 [6]), but includes other types of activities as well. Despite the broad language of Industrial Code § 23-1.4 (13), LL § 241 (6) is "inapplicable outside the construction, demolition or excavation contexts." *Esposito v New York City Industrial Development Agency*, 1 NY3d 526, 528 (2003).

Even if defendant's motion was timely, the court would not have granted summary judgment because defendant failed to establish that plaintiff was not involved in construction work, or that an Industrial Code provision was not violated, or that a violation of the Code was not the proximate cause of the injury.<sup>5</sup>

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<sup>5</sup>Defendant cites *McGovern v Fordham Hill Owners Corp.* (173 AD2d 162 [1st Dept 1991]) for the proposition that plaintiff's § 241 (6) claim must be dismissed. In that case, plaintiff was lacquering a floor when the it exploded and caught on fire. The First Department dismissed the action on the basis that "plaintiff has failed to present any evidence demonstrating either that a violation of the LL was a contributing cause of the explosion (internal citations omitted) or that any negligence on the part of appellants caused plaintiff's injuries." (*id.*). In dismissing the action, the First Department relied upon two cases dismissing LL actions because of the failure to cite an applicable Industrial Code regulation which was violated. Here, however, plaintiff has cited Industrial Code regulations which may have been violated.

Issues of fact exist as to whether plaintiff's activities were performed in connection with a larger renovation of the apartment. See *Tornello v Beaver Brook Assoc., LLC*, 8 AD3d 7 (1st Dept 2004) (installation of carpeting constituted construction work under LL § 241 (6) because it was done as part of a process in finishing a new house).<sup>6</sup> Plaintiff testified at his deposition that when he performed the work, the apartment was vacant, but was being refurbished (Koci Tr at 22). Defendant's witness, Ruhl, testified that he had no recollection as to whether kitchen cabinets were put in and whether appliances were replaced (Ruhl Tr at 30). Accordingly, the record is insufficient to establish that plaintiff was not involved in construction as defendants have not established that plaintiff's work was not done as part of a process in upgrading the apartment for new occupants (*see Tornello, supra*).<sup>7</sup>

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<sup>6</sup>In *Tornello*, plaintiff was a worker whose employer had contracted to install carpeting in a house that was being constructed (*Tornello v Beaver Brook Assoc, LLC*, Sup Ct, Bronx County, December 2, 2003, Targum, J., Index No 13640/02). During the preliminary stages of plaintiff's work, while carrying the ninth roll of carpeting from a van into the house, plaintiff tripped on debris (*id.*). Regardless of whether the installation of carpeting itself constituted an activity covered under the LL, plaintiff was covered by LL § 241 (6) because his activity was done within the context of other trades finishing construction of a new house.

<sup>7</sup>Whether or not plaintiff's activities of mopping, sanding and lacquering the floors constitutes an alteration is not addressed at this time.

The Industrial Code sections upon which plaintiff relies are 12 NYCRR 12-1.2 (a);<sup>8</sup> 12-1.4 (a), (b) (1-4); 12-1.6 (a) (1-3); 12-1.7 (a), (b); and 23-1.7 (g). As previously noted, plaintiff's cross motion is denied as untimely. However, even if the cross motion had been timely, it would have been denied. Plaintiff's testimony was not sufficiently specific to establish that he was involved in construction work. Further, a violation of the Industrial Code is only "some evidence of negligence" (*Rizzuto v L.A. Wenger Contracting Co.* 91 NY2d at 349).

Moreover, comparative negligence is applicable in cases under LL § 241 (6) (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, *supra*), and, given that plaintiff escaped through a closed window, an issue of fact exists as to what extent a violation of the Industrial Code was attributable to defendant.<sup>9</sup>

Issues of fact exist for trial as to whether defendant violated Industrial Code § 12-1.4 (b) (2), (b) (3) and (b) (4),

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<sup>8</sup> "[A] plaintiff must demonstrate that the owner or general contractor violated a specific rather than a general safety standard established by the Labor Commissioner" in order to establish a claim under LL § 241 (6). *Ozzimo v H.E.S., Inc.*, 249 AD2d 912, 914 (4th Dept 1998); *see also Ross v Curtis-Palmer Hydro Electric Co.*, 81 NY2d 494, *supra*. Industrial Code section 12 NYCRR 12-1.2 (a) is, of course, a general statement of the application of safety standards, and will not support a claim under LL § 241 (6).

<sup>9</sup> Under Industrial Code § 12-1.4 (c), an employee "shall use the control and protective equipment provided for his protection." The record is unclear as to whether instructions were given, and if so, disregarded.

Industrial Code § 12-1.6 (a), and Industrial Code § 12-1.7. Industrial Code § 12-1.4 (b) (3) and (b) (4) have been found sufficiently specific to support such a claim. See *Piazza v Frank L. Ciminelli Construction Co., Inc.*, 2 AD3d 1345 (4<sup>th</sup> Dept 2003). Industrial Code § 12-1.4 (b) (3) provides that no employer will allow its employee to work in a room "in which there exist dangerous air contaminants in a work atmosphere." Sub-section (b) (4) provides that no employer shall permit dangerous air contaminants to "accumulate or remain" in such work areas. These sub-sections apparently refer to the requirement that dangerous air contaminants be kept at the "lowest practicable level" "using proper control or protective procedures and equipment," as stated in sub-section 12-1.4 (a), because otherwise, no worker could ever work in a room using any product containing air contaminants, an unlikely interpretation. Accordingly, whether contaminants were kept at the "lowest practicable level" "using proper control or protective procedures" must be decided at trial. See *Osorio v Kenart Realty, Inc.*, 2006 NY Slip Op 9433 (2d Dept 2006) (employee was injured when glue vapors ignited in an unventilated basement; owner denied summary judgment for failure to demonstrate that Industrial Code § 12-1.4 and § 12-1.6 through 1.9 were inapplicable, or, were not violated, or, that a violation was not

the proximate cause of the injury).<sup>10</sup> Further, Industrial Code § 12-1.4 (b) (2), which requires every employer to instruct employees on the "hazards of their work, the use of the control or protective equipment and their responsibility for complying with the provisions" appears to be sufficiently specific.<sup>11</sup>

Issues of fact also exist regarding whether Industrial Code section 12-1.6 (a) was violated. See *Osorio v Kenart Realty, Inc., supra*. That provision is concerned with "General control methods," and mandates that "[o]ne or more" of the listed methods be utilized to "prevent, remove or control dangerous air contaminants." Defendant maintains that the section was not violated because the room in which plaintiff was working contained windows and doors which provided ventilation in compliance with the Industrial Code. As plaintiff notes, harmful vapors did accumulate because a fire did occur. However, as

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<sup>10</sup>Thus, cases like *Public Serv. Mut. Ins. Co. v 99¢ Plus of Fifth Ave., Inc.* (5 AD3d 276 [1st Dept 2004]) are inapposite because here plaintiff need not prove the cause of the ignition of the fire in order to establish a violation of this Industrial Code provision.

<sup>11</sup>It has been found that sections 12-1.4 (a) and (b) (1) and (b) (2) are general rather than specific rules, and so, cannot support a LL § 241 (6) claim. See *Piazza v Frank L. Ciminelli Construction Co., Inc.*, 2 AD3d 1345 (4<sup>th</sup> Dept 2003). However, *Piazza* found, without any discussion, that section 12-1.4 (b) (2) was not sufficiently specific. Whether or not an employer instructs or fails to instruct an employee on the use of a control method is a concrete and specific requirement, and, it would be unlikely that the Industrial Code would permit an employer to use a specific control method, absent instruction to the employee regarding how to implement that method.

previously noted, plaintiff has not demonstrated that the reason for the lack of ventilation is attributable to defendant. Moreover, defendant has not shown that the control method of "Dilution ventilation," which is defined in Industrial Code § 12-1.3 (i) as a ventilation system "which reduces air contamination to safe levels by the introduction of uncontaminated air," satisfied defendant's obligations (e.g., defendant has not demonstrated that the apartment contained sufficient apertures to allow the introduction of enough uncontaminated air to reduce the contaminants to safe levels).

Issues of fact also exist regarding whether Industrial Code § 12-1.7, entitled "Prevention of ignition," was violated. It states, in pertinent part:

(a) [a]ll processes or operations using or generating air contaminants which constitute a fire or explosion hazard shall be protected from sources of accidental ignition. Unless such processes or operations are isolated by tight partitions or enclosures they shall not be conducted within 20 feet of any materials, devices or operations which produce flames or sparks including, by way of illustration but not by way of limitation, engines, motors, welding and soldering torches. All processes and operations within 20 feet of any spark or flame producing work such as welding shall be discontinued and all ignitable air contaminants, flammable liquids and accumulated flammable residue shall be removed from the area of the flame or spark hazard before such work is begun.

(b) Concentrations of vapors which may be present in enclosed areas shall be deemed to be flammable when any such concentration exceeds 25 percent of the lower explosive level.

Plaintiff would not have been entitled to summary judgment

under this provision because he has not established that a violation of Industrial Code § 12-1.7 was the proximate cause of his injury. Plaintiff's expert's conclusory report, opining that "it is obvious that the turning on of the switch most likely created the spark that was the cause of the ignition" is insufficient. The warning label on the lacquer itself suggests that the lacquer could have ignited as the result of a build up of heat. Moreover, plaintiff's reliance on the doctrine of *res ipsa loquitur*, is unavailing. It has not been shown that the fire was caused by defendant's negligence, or that defendant had "exclusive control over the agency or instrumentality which caused the fire." *Board of Education of Ellenville Central School v Herb's Dodge Sales & Service, Inc.*, 79 AD2d 1049, 1050 (3d Dept 1981); see also *North Star Contracting Corp. v Burton F. Clark, Inc.*, 214 AD2d 550 (2d Dept 1995).<sup>12</sup>

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<sup>12</sup>Industrial Code § 23-1.7 (g), and the testing requirements it contains, while sufficiently specific to support a claim under LL § 241 (6), is inapplicable to the present case. This rule is concerned with "Protection from general hazards," and reads:

*Air contaminated or oxygen deficient work areas.* The atmosphere of any unventilated confined area including but not limited to a sewer, pit, tank or chimney where dangerous air contaminants may be present or where there may not be sufficient oxygen to support life shall be tested by the employer, his authorized agent or by designated person before any person is suffered or permitted to work in such area. Such testing shall be in accordance with the provisions of the Industrial Code Part (rule) 12 relating to the "Control of Air Contaminants" and such

### III. Conclusion

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied as untimely and even if timely, would have been denied for the reasons stated herein; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied as untimely and even if timely, would have been denied

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areas shall be subject to the other pertinent provisions of Industrial Code Part (rule) 12 and of Industrial Code Part (rule) 18 relating to "Exhaust Systems."

The definition of "confined space" is contained in Industrial Code § 12-1.3 (f), and reads

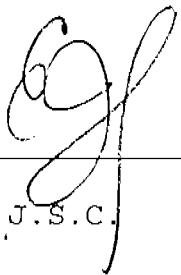
[a] tank, vault or similar enclosed structure or space with restricted means of egress, such as a manhole or trap door, which is so enclosed and of such volume that natural ventilation through openings provided will not prevent the accumulation of dangerous air contaminants nor supply sufficient oxygen to protect the life, health and safety of any person occupying such structure or space.

From this definition, it is apparent that a room with a door and windows is not an "unventilated confined area" as that term is used in Industrial Code § 23-1.7 (g) and 12-1.3 (f), since ventilation is available through these openings. See *Mazzocchi v International Business Machines, Inc.*, 294 AD2d 151 (1<sup>st</sup> Dept 2002) (Industrial Code 23-1.7 (g) did not apply to small spaces which only resembled a pit). Further, as the air contaminants were not present prior to plaintiff's work, the provision is inapplicable. See *Osorio v Kenart Realty, Inc.*, *supra*.

for the reasons stated herein.

Dated: January 29, 2007

ENTER :



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J.S.C.

**EMILY JANE GOODMAN**

**FILED**  
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