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

PRESENT: BARBARA R. KAPNICK J.S.C. Justice

PART 12

Index Number : 104211/2005
OU, JIAN CAI
VS
125 BOWERY
Sequence Number : 004
DISMISS

INDEX NO. 104211/05

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

s motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1/8/08

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

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JIAN CAI OU,

Plaintiff,

-against-

125 BOWERY INC. and ASIAN CITY, INC.,

Defendants.

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DECISION/ORDER

Index No. 104211/05
Motion Seq. No. 004

BARBARA R. KAPNICK, J.:

This is an action pursuant to Labor Law §§ 240(1), 241(6) and 200 and for common law negligence.

Plaintiff Jian Cai Ou seeks to recover damages for personal injuries he sustained on March 30, 2004 while replacing a sign on the awning of a building located at 239 Grand Street, New York, New York. Plaintiff was standing on an extension ladder which was leaning against the building when the ladder allegedly slipped, causing plaintiff to fall.

Defendant 125 Bowery, Inc. was the owner of the building. Defendant Asian City, Inc. leased the premises for use as a cellular and mobile communications store.[1]

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[1] Defendant Asian City failed to serve an Answer and/or appear in this action. As a result, plaintiff was granted a default judgment against said defendant pursuant to Decision/Order of the Hon. Harold Beeler dated November 23, 2005, and defendant 125 Bowery was granted a default judgment on its cross-claim for contractual indemnification against said defendant pursuant to Decision/Order (Beeler, J.) dated July 12, 2006.

Defendant 125 Bowery, Inc. now moves for summary judgment dismissing plaintiff's complaint on the grounds, inter alia, that plaintiff's accident is not governed by the Labor Law because his work did not involve an alteration to a building or structure.

It is well settled that "'altering' within the meaning of Labor Law § 240(1) requires making a *significant* physical change to the configuration or composition of the building or structure." Joblon v. Solow, 91 N.Y.2d 457, 465 (1998). Likewise, "the protections of Labor Law § 241(6) do not apply to claims arising out of maintenance of a building or structure outside of the construction context". Nagel v. D & R Realty Corp., 99 N.Y.2d 98, 99 (2002).

Defendant argues that the instant case is analogous to Munoz v. DJZ Realty, LLC, 5 N.Y.3d 747 (2005), in which plaintiff was injured in a fall while applying a new advertisement to the face of a billboard that sat atop a building owned by the defendant.

The Court of Appeals found in that case that "[p]laintiff's activities may have changed the outward appearance of the billboard, but did not change the billboard's structure, and thus were more akin to cosmetic maintenance or decorative modification than to 'altering' for purposes of Labor Law § 240(1) *(see Joblon*

v. Solow, [supra])." Munoz v. DJZ Realty, LLC, supra at 748; see also, Hatfield v. Bridgedale, LLC, 28 A.D.3d 608 (2nd Dep't 2006) (application of an advertisement to the face of a billboard that sat atop a building was not a protected activity under the Labor Law, since it did not change the building's structure); Maes v. 408 W. 39 LLC, 24 A.D.3d 298 (1st Dep't 2005), lv. to app. denied, 7 N.Y.3d 716 (2006)(removal of a vinyl banner, which consisted of loosening nuts and sliding the temporary banner off the bolts attached to the building, did not constitute an 'alteration' under Labor Law § 240(1) or 'construction' under Labor Law § 241(6) since it involved no change in the configuration or composition of the building); and Anderson v. Schwartz, 24 A.D.3d 234 (1st Dep't 2005), lv. to app. denied, 7 N.Y.3d 707 (2006) (removal of a 'temporary' aluminum auction sign from a building did not constitute an "alteration" within the meaning of Labor Law §§ 240[1] and 241[6]).

Plaintiff, however, argues that the instant case is distinguishable on its facts from Munoz v. DJZ Realty, LLC, supra and its progeny, because in the instant case, plaintiff was not involved in the application of a paper advertisement to the face of a billboard, or the removal or installation of a vinyl banner or temporary aluminum sign; rather, plaintiff was engaged in the removal and installation of a large, heavy canopy sign, which was

between four to five feet in height and ran the approximate length of the store. Plaintiff notes that three men were required to remove the first canopy sign, and that the installation of the second replacement sign required additional drilling and attachments into the brick facade of the building.

Plaintiff thus contends that he was engaged in the type of work contemplated by the Labor Law. See, Vasquez v. Skyline Const. & Restoration Corp., 8 A.D.3d 473 (2nd Dep't 2004), lv. to app. denied, 3 N.Y.3d 611 (2004), rearg. denied, 4 N.Y.3d 740 (2004), in which the Court held that the erection of a sign on a portion of a building fell within the purview of the statute; and Kadoic v. 1154 First Avenue Tenants Corp., 277 A.D.2d 66 (1st Dep't 2000), in which the defendants were found liable pursuant to Labor Law § 240(1) for injuries sustained by plaintiff while removing a sign.

Based on the papers submitted and the oral argument held on the record on August 1, 2007, this Court finds that plaintiff was engaged in 'altering' of a building or structure within the meaning of Labor Law § 240(1), and in 'construction' work within the meaning of Labor Law § 241(6).

Defendant 125 Bowery alternatively argues that it cannot be held liable under the Labor Law because Asian City hired

plaintiff's employer without its knowledge and in violation of the Thirteenth paragraph of the Lease which provides that

> [n]o sign, advertisement or notice shall be affixed in or placed upon any part of the demised premises by the Tenant, except in such manner, and of such size, design and color as shall be approved in advance in writing by the Landlord.

The Appellate Division, First Department, has held that an out-of-possession landlord may not be held liable under Labor Law §§ 240(1) and 241(6) where the work "was performed without its consent and in violation of the lease, which required proper written approval". Sanatass v. Consolidated Investing Co., Inc., 38 A.D.3d 332 (1st Dep't 2007). See also, Abbatiello v. Lancaster Studio Associates, 3 N.Y.3d 46 (2004); Morales v. D & A Food Service, 41 A.D.3d 352 (1st Dep't 2007).

Plaintiff, however, argues that there is a triable issue of fact as to whether defendant 125 Bowery knew or should have known that Asian City, which pursuant to paragraph 23 of the Lease Rider was granted access to the premises prior to the commencement of its rental obligations "to begin renovations", was conducting the work in question and whether it consented to such work.

Indeed, Puiyim Chiu, the owner and vice president of the management company for the building, acknowledged at her deposition

that all seven stores in the building had signs. Moreover, plaintiff claims that defendant's office was directly across the street from the building where plaintiff was injured and thus she must have seen the sign when it was originally installed. Accordingly, this branch of defendant 125 Bowery's motion is denied.

Defendant next argues that plaintiff's claim pursuant to Labor Law § 240(1) must be dismissed on the ground that his actions were the sole proximate cause of his accident, because it was the plaintiff who placed the ladder against the wall, inspected the ground, and made a conscious choice not to ask for assistance in climbing the ladder. See, Blake v. Neighborhood Hous., 1 N.Y.3d 280 (2003).

However, defendant has not established that plaintiff's actions were the 'sole' proximate cause of his accident since there is no evidence that safety devices existed on the site and were made available to plaintiff. Figueiredo v. New Palace Painters Supply Co. Inc., 39 A.D.3d 363 (1st Dep't 2007). It has been repeatedly held that the failure to supply a worker with a properly secured ladder or any safety device constitutes a proximate cause of a resulting fall. See, Ranieri v. Holt Construction Corp., 33

A.D.3d 425 (1st Dep't 2006); Samuel v. Simone Dev. Co., 13 A.D.3d 112 (1st Dep't 2004).

Accordingly, that portion of defendant's motion seeking to dismiss plaintiff's claim pursuant to Labor Law § 240(1) is denied.

Defendant next argues that plaintiff's claim pursuant to Labor Law § 241(6) must be dismissed because plaintiff has failed to cite an applicable provision of the Industrial Code.

In opposition, plaintiff argues that there is an issue of fact as to whether there was a violation of 12 NYCRR 23-1.21(b)(4)(iv) which provides, in relevant part, as follows:

> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means...

Based on the foregoing section, that portion of defendant's motion seeking to dismiss plaintiff's claim pursuant to Labor Law § 241(6) is denied. See, Johnson v. Flatbush Presbyt. Church, 29 A.D.3d 862 (2nd Dep't 2006).

Finally, defendant 125 Bowery argues that plaintiff's claims pursuant to Labor Law § 200 and for common law negligence must be

dismissed on the ground that it did not supervise or control plaintiff's work.

This branch of defendant's motion is granted without opposition, and said claims are dismissed with prejudice and without costs or disbursements.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on January 23, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: January 8, 2008

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.