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

PRESENT: DEBRA A. JAMES Justice — PART 59

DAVID BELDING,

Plaintiff,

- v -

VERIZON NEW YORK, INC., NORTHERN BAY CONTRACTORS, INC., and TISHMAN INTERIORS CORPORATION,

Defendants.

Index No.: 113279/04

Motion Date: 05/06/08

Motion Seq. No.: 02

Motion Cal. No.: 15

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2 - 4
Replying Affidavits - Exhibits	5 - 7

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers,

In this action for injuries suffered by the plaintiff in a fall from a 12-foot ladder while working at defendants' premises, the court shall grant plaintiff's motion for partial summary judgment on the Labor Law 240 (1) claim and deny defendants' motion to dismiss same.

The accident occurred on May 25, 2004, while plaintiff was adjusting "BlastGARD" window protection film over the entrance doorway after having initially installed the film at this location in April 2004 as part of a project to improve security

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

in the building lobby.[1] It is uncontroverted that Tishman provided the plaintiff with the ladder from which he fell. Plaintiff stated that as he attempted to attach the replacement film to the window he saw the legs of the ladder spread and the ladder then kicked out from underneath him causing him to fall.

Defendants argue that plaintiff's work was not a protected activity under Labor Law 240 (1) because it did not constitute an "alteration" to the existing structure under the statute. Defendants rely upon the Court's decision in Joblon v Solow (91 NY2d 457, 465 [1998]) where it was stated 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." The Court in Joblon found however that "[b]ringing an electrical power supply capable of supporting the clock to the mail room, which required both extending the wiring within the utility room and chiseling a hole through a concrete wall so as to reach the mail room is more than a simple, routine activity and is significant enough to fall within the statute." Id. at 465.

Defendants though argue that plaintiff's work here is more analogous to the replacement of an advertisement citing Munoz v

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[1] The parties' submissions set forth that the "BlastGARD" window protection film enhances building security and that "in the event of a major explosion, BlastGARD helps hold the razor sharp glass fragments together, preventing flying shards of glass from becoming deadly weapons."

DJZ Realty, LLC, 5 NY3d 747, 748 (2005) where the Court stated that

> Plaintiff was injured in a fall while applying a new advertisement to the face of a billboard that sat atop a building owned by defendant. Plaintiff'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).

The court agrees with plaintiff that defendants' analogy is inapposite. The submissions of the parties set forth that the BlastGARD film was intended to have no cosmetic application - that is, the film was to be an invisible security feature whose purpose was to protect occupants from flying glass shards. Furthermore, the defendants' construction manager stated that plaintiff's work was part of the security hardening project being undertaken at defendants' premises including "reconstruction of the main entrance." The fact that plaintiff at the time of the accident was readjusting the film to the architect's specifications does not render the activity "cosmetic" or "routine" when viewed in the context of the larger construction project that involved a significant alteration to the premises to enhance security. See Prats v Port Authority of New York and New Jersey, 100 NY2d 878, 883 (2003) ("a confluence of factors brings plaintiff's activity within the statute: his position as a mechanic who routinely undertook an enumerated activity, his employment with a company engaged under a contract to carry out

an enumerated activity, and his participation in an enumerated activity during the specific project and at the same site where the injury occurred").

"[O]nce a plaintiff makes a prima facie showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device." Kosavick v Tishman Const. Corp. of New York, 50 AD3d 287, 288 (2008). The facts of this case establish that plaintiff has made this prima facie showing. "[T]o defeat summary judgment in this case based on violations of the Labor Law, defendant would necessarily have to establish that plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured." Id. (internal quotations and citations omitted). Defendants here provided the presumptively inadequate ladder whose collapse led to plaintiff's injuries and therefore the plaintiff cannot by operation of law be the sole proximate cause of the accident.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the cause of action for liability under Labor Law 240 (1) is GRANTED; and it is further

ORDERED that defendants' cross-motion for summary judgment is DENIED; and it is further

ORDERED that the parties are directed to attend any previously scheduled mediation conference and provide the mediator with a copy of this Order, and if this action is not settled thereat, the parties are directed to attend a pre-trial conference on January 8, 2009, at 2:30 P.M., in IAS 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: NOV 17 2008 ENTER:

DEBRA A. JAMES J.S.C.
J.S.C.

FILED
NOV 26 2008
COUNTY CLERK'S OFFICE
NEW YORK