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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

HUMBERTO VALLADARES,
Plaintiff,

- v -

820 LLC, DUELL, LLC, OILILY, OILILY COMPANY and "Tenant of 820 Madison Avenue, New York, New York 10021", a fictitious name representing the tenant of the store located at 820 Madison Avenue,
Defendants.

Index No.: 116884/2006
Motion Date: 07/22/08
Motion Seq. No.: 03
Motion Cal. No.: _____

The following papers, numbered 1 to _11__ were read on this motion and cross motions for summary judgment _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____	1
Notice of Cross Motion/Answering Affidavits - Exhibits _____	2
Replying Affidavits - Exhibits _____	3, 4
Notice of Cross Motion- Affidavits-Exhibits	5, 6, 7
Answering Affidavits- Exhibits	8, 9, 10, 11

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers,

Plaintiff's cross motion for summary judgment under Labor Law 240(1) shall be granted as there is no dispute that the ladder was not placed to give proper protection to the plaintiff. In Guillory v Nautilus Real Estate, Inc. (208 AD2d 336, 338 [1995]) the First Department stated that

> Section 240 (1), however, requires that contractors and owners shall provide ladders and other devices "placed

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**

> as to give proper protection" ... The purpose behind this provision is to protect workers by placing the ultimate responsibility where it belongs, on the owners and general contractors ... In a case where a worker fell from the fourth or fifth step of a ladder while sandblasting a railroad car, it was held that a prima facie showing of 'elevation-related risk' under the statute had been made (Gordon v Eastern Ry Supply, 82 NY2d 555, 561). *** The Court of Appeals noted that the "'core'" objective of section 240 (1), the prevention of the fall, was not met and concluded that Gordon was within the protection of the statute. Similarly in Perry v National Structures (192 AD2d 1136),***, the general contractor was held liable pursuant to Labor Law §240(1), the Court noting that plaintiff had fallen while working at an elevated site in the absence of adequate safety devices.

In this case, the evidence that plaintiff placed the ladder where "it tipped...because of the floor not because of the ladder" does not establish that he was the sole proximate cause of the accident, since the slope of the sidewalk was unrelated to the duty of the owner and its agent and contractor (here the tenant) to provide a safety device adequate to prevent the ladder from slipping or to protect plaintiff from falling.

Nothing in the record rebuts the affidavit of plaintiff's expert that rather than an A frame ladder, a scissor man lift with fall protection, a moveable scaffold with outriggers or a leveled platform ladder was proper equipment for the heights at which plaintiff was working pursuant to Labor Law § 240(1). Nor does the placement of plaintiff's feet on the top step from the platform of the ladder at the time of the accident absolve defendant owner and its agent and contractor from liability on the basis that plaintiff was the sole proximate cause of his

accident. "[T]he Labor Law does not require plaintiff to have acted in a manner that is completely free from negligence," and "plaintiff cannot be solely to blame" for the accident if a statutory violation is a proximate cause of an injury. Hernandez v Bethel United Methodist Church, 49 AD3d 251, 253 (1st Dept 2008).

Moreover, the order of Appellate Division, First Department in Sanatass v Consolidated Investing Company was reversed by the Court of Appeals in Sanatass v Consolidated Investing Company, 10 NY3d 333 (2008). Thus, the argument of defendant owner and agent that they are not liable based upon their lack of notice of the chemical stripping and sealing work performed by plaintiff under his employer's contract with the defendant tenant is of no avail to the moving defendants.

This court likewise disagrees with defendant tenant that it has no duty to plaintiff under the Labor Law, since it admits that it hired plaintiff's employer to carry out the facade work. See Bart v Universal Pictures, 277 AD2d 4, 5 (1st Dept 2000).

In addition, the opinions set forth in the affidavit of plaintiff's expert establish a prima facie case demonstrating a violation of a specific provision of the State Industrial Code. Plaintiff's expert cites 12 NYCRR 23-1.21(e)(3) which requires that there be either a person steadying the ladder or a mechanical means provided that would secure the ladder from

swaying, where a person is working more than 10 feet above the footer of the stepladder. There is evidence that plaintiff was working at such a height, and no proof of compliance with 12 NYCRR 23-1.21(e)(3). Such is a breach of Labor Law §241(6), which is some evidence of negligence. However, plaintiff's testimony that the ladder slipped because it was on a sloping sidewalk and that he failed to ask his supervisor, who was present, to steady the ladder, raises an issue of fact as to proximate cause and comparative fault so plaintiff is not entitled to summary judgment with respect to his claim under Labor Law §241(6).

Plaintiff does not allege that any of the defendants had notice, let alone, any supervision or control over plaintiff's work. There is no evidence of any common law negligence or negligence under Labor Law § 200.

Finally, defendant 820 LLC is entitled to contractual indemnification from defendant Oilily's Retail USA, Inc. d/b/a Oilily S/h/a Oilily and Oilily's Retail USA, Inc. D/b/a Oilily s/h/a Oilily Company under the Lease dated July 1, 1998. Correa v 100 West 32nd St. Realty Corp., 290 AD2d 306 (1st Dept 2002).

Accordingly, it is

ORDERED that plaintiff's cross motion for summary judgment on liability against defendants under Labor Law § 240 (1) is GRANTED; and it is further

ORDERED that defendants 820 LLC and Duell LLC's motion and defendant Oilily/Oilily Company's cross motion for summary judgment against plaintiff dismissing plaintiff's cause of action under Labor Law §§ 240(1) and 241(6) is DENIED; and it is further

ORDERED that defendants 820 LLC and Duell LLC's motion and defendant Oilily/Oilily Company's cross motion for summary judgment dismissing plaintiff's cause of action under Labor Law § 200 and for common law negligence is GRANTED; and it is further

ORDERED that defendants 820 LLC and Duell LLC's motion for summary judgment on its cross claims for contractual indemnification against defendant Oilily/Oilily Company is GRANTED and defendant Oilily/Oilily Company shall provide insurance coverage, defense and indemnification to defendants 820 LLC and Duell LLC; and it is further

ORDERED that the parties and their counsel are directed to attend a mediation conference before Part Mediation-1 on or before March 31, 2009, at 10:30 A.M. If the case does not settle in Part Mediation-1, the parties' counsel are directed to attend a pre-trial conference in IAS Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on April 21, 2009, at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: February 23, 2009

ENTER:

J.S.C.