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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

PRESENT: HON. WILLIAM R. LaMARCA
Justice

FRANK GOLDSMITH and LINDA GOLDSMITH,

Plaintiffs,

-against-

JOYANNA MARX and WALTER GOBELMAN, Trustees u/d/t 12731/94, JOYANNA MARX/WALTER SOBELMAN c/o BRB MANAGEMENT CO., BRB MANAGEMENT CO., EDWARDS COFFEE SHOP & RESTAURANT, INC., EDWARDS COFFEE SHOP & RESTAURANT, INC., d/b/a EL TAZUMAL RESTAURANT, FELIPE VILLATORO,

Defendants.

Motion Sequence #3, #4, #5
Submitted January 5, 2009

INDEX NO: 12541/06

The following papers were read on these motions:

COFFEE SHOP Notice of Motion (#3).....1
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Defendants, EDWARDS COFFEE SHOP & RESTAURANT, INC., EDWARDS COFFEE SHOP & RESTAURANT, INC. d/b/a EL TAZUMAL RESTAURANT, and FELIPE VILLATARO (hereinafter collectively referred to as the "COFFEE SHOP Defendants"), move (#3) for an Order, pursuant to CPLR §3212, awarding them partial summary judgment and dismissing the second cause of action of the plaintiffs, FRANK GOLDSMITH and LINDA GOLDSMITH's complaint, which alleges violations of the Labor Law. Plaintiffs oppose the motion and move (#4) for an Order, pursuant to CPLR §3212, granting them partial summary judgment on their Labor Law claims against defendants, JOYANNA MARX and WALTER SOBELMAN, Trustees u/d/t 12731/94, and JOYANNA MARX and WALTER SOBELMAN c/o BRB MANAGEMENT CO. (hereinafter collectively referred to as "MARX./SOBELMAN"). MARX/SOBELMAN oppose the motion and cross-move (#5) for an Order, *inter alia*, pursuant to CPLR §3212, granting them summary judgment dismissing the plaintiffs' complaint and all cross claims as asserted against. The motions and cross-motion are determined as follows:

This is an action for personal injuries sustained by the plaintiff, FRANK GOLDSMITH (hereinafter referred to as the "plaintiff"), on September 2, 2005 at approximately 11:00 a.m., when he fell from a ladder while in the course of his employment as an "outside field technician" for Verizon, at the premises located at 6 Glen Street, Glen Cove, New York (the "subject premises"). The subject premises are owned by defendants, MARX/SOBELMAN. Pursuant to a lease agreement between the tenant, FELIPE VILLATORO, and the landlords JOYANNA MARX/WALTER SOBELMAN c/o BRB MANAGEMENT CO., the COFFEE SHOP Defendants leased the first floor of the two (2) story commercial building at the subject premises. Plaintiff's

accident occurred at the rear of the COFFEE SHOP Defendants' restaurant, EL TAZUMAL.

At his examination before trial (EBT), plaintiff testified that at the time of the accident, he had been employed with Verizon for twelve years as an "outside field technician" (*Goldsmith Tr.*, p. 12). He explained that "[p]art of the outside field technician job that I was doing that day was repairing defective telephone lines, phones and/or equipment" (*Id*). He stated that in order to do his job, he utilized "hand tools" including ladders and wire cables (*Id.* at 13) which were made available on the Verizon truck he used to drive from job to job (*Id.* at 19).

Plaintiff stated that on the day of the accident, he had a written work order for a job that directed him to the "[r]ear wall terminal [at] Six Glen Street" (*Id.* at 18). Plaintiff recalled that the work order specified that "[s]omeone's phone wasn't working" (*Id*). The President of the coffee shop/restaurant, defendant, FELIPE VILLATORO, testified at his EBT that he did not contact Verizon about the defective phone service. In fact, VILLATORO stated that he did not even have Verizon phone service for his business.

Upon their arrival at the subject premises, plaintiff and his partner walked into the coffee shop and met with three (3) female employees to whom they tried to communicate that "we had a telephone repair that we needed to look at on the back of the building" to no avail (*Id.* at 27). Plaintiff explained that he then "reverted to hand signals, sign language" which was effective (*Id.* at 30). Plaintiff stated "I indicated telephone man, making believe I was holding a phone to my ear, and pointed out the back door, telephone" (*Id*). He and his partner then went through the kitchen to the back door in search of the rear wall terminal.

Margarita Escobar, a witness on behalf of the COFFEE SHOP Defendants, testified at her EBT that, at the time of the accident, she was working in the kitchen of EL TAZUMAL RESTAURANT. She recalled two (2) men passing by her in the restaurant on the date of plaintiff's accident. She stated that they did not make any hand gestures to her that would implicate that they were seeking permission to enter the premises. Yet, she acknowledged at her deposition that they entered the premises and proceeded through the kitchen to the back door.

Plaintiff testified that he and his partner went through the back door, and exited the building. He stated that the back door opened onto an enclosed square light shaft. Plaintiff opened the door and stepped onto a platform which was level with the kitchen floor. He stated that he could not see the rear wall terminal from the platform but that there was a wooden ladder, standing approximately vertical, alongside the brick wall of the shaftway below the platform. Plaintiff stated that he used this ladder to climb down to "look for the rear wall terminal" (*Id.* at 36). Plaintiff admitted at his deposition that he had not asked anyone if he could use the ladder leading down the shaft (*Id.* at 82).

At his EBT, defendant, FELIPE VILLATORO testified that the subject stairs and ramp were constructed by a man named Tomas at his request around the year 1989. The steps were attached to a platform just outside the back door in the kitchen. The ladder was approximately ten (10) feet tall with approximately eight (8) to ten (10) rungs. It extended all the way down the shaft and was affixed to defendants' premises by nails. VILLATORO stated that, while the steps were built at his request, he consulted the landlord/owner, WALTER SOBELMAN, prior to the construction of the platform (*Villatoro Tr.*, p. 48) and that SOBELMAN replied "No problem" (*Id.* at 50). VILLATORO

also testified that WALTER SOBELMAN viewed the platform and steps once their construction was complete (*Id*). He further testified that there were no changes to the structures from the time the stairs and ladder were built in 1989 to the time of plaintiff's accident in 2005. As to prior use, VILLATARO stated that there was only one (1) time prior to plaintiff's accident that someone other than VILLATORO or his son used the stairs and this use was by way of a telephone company employee who asked permission to go and look at the wires in the shaft. VILLATORO testified that the steps were used somewhere between twenty (20) and fifty (50) times by him and his son, with the last use approximately one (1) month before the accident.

As to the accident itself, plaintiff testified that he descended the ladder by turning around, facing the ladder, and, at first, holding onto the door knob of the kitchen door. He stated that he stepped onto the first step and "kind of bounced up and down. I went down to the second step, holding on to the door knob. I bounced up and down a little bit. It was home-built, I was testing it. When I got down to the third step, that was as far as I could go, touching the doorknob" (*Goldsmith Tr.* at 44). Plaintiff testified that he was able to get to the base of the shaft without incident. He did not notice any instability of any kind on the way down (*Id.* at 45). Approximately five (5) minutes later, after not seeing any rear wall terminal at the base of the shaft, he attempted to ascend the ladder. He got to the third step from the top, reached with his left hand, for the door knob of the door leading to the kitchen that was still open, and as his left hand touched and grabbed the door knob, "the ladder kicked out to [his right] side." The entire ladder, together with plaintiff's body, kicked out to the right. As a result, plaintiff, together with the ladder, fell to the base of the shaft. At this time, plaintiff's partner had gone to find

the rear wall terminal somewhere else. Ultimately, plaintiff got out of the shaft by way of the same ladder. He testified that at no point did he ask his partner to get the ladder provided by Verizon from the truck (*Id.* at 57-58). He stated that his partner helped him up and they both exited the coffee shop without having made any repairs (*Id.* at 59). It is plaintiff's position that defendants had both actual and constructive notice of the dangerous condition at the subject premises and that he sustained serious and permanent injuries, including ankle fracture, aggravation of pre-existing arthritic and diabetic condition, laceration to the nose, loss of consciousness, pain and limitation of motion. (*Bill of Particulars* ¶ 9).

Margarita Escobar, on behalf of the COFFEE SHOP Defendants, testified that she did not become aware that one of these men had been injured. At the time when the men left, she did not notice any injuries or torn clothing and the men did not say anything to her.

The COFFEE SHOP Defendants and defendants, MARX/SOBELMAN, move for summary judgment dismissing plaintiffs' claims. Plaintiffs oppose and, in turn, cross-move for summary judgment but only on their Labor Law §240(1) claim and only as asserted against the owners of the subject premises, MARX/SOLOMON.

The standards for summary judgment are well settled. "On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627 (C.A.2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (C.A. 1986); *Winegrad v*

New York Univ. Med. Ctr., 64 NY2d 851, 487 NYS2d 316, 476 NE2d 851 (C.A. 1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King, supra*; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demshick v Community Housing Management Corp.*, 34 AD3d 518, 824 NYS2d 166 (2d Dept. 2006), citing *Secof v Greens Condominium*, 158 AD2d 591, 551 NYS2d 563 (2d Dept. 1990).

Labor Law §240(1)

In support of their respective motions for summary judgment, the moving defendants maintain, that the plaintiff should not be afforded the protections of the Labor Law section as he was not involved in a protected activity under the Labor Law. Defendants claim that the Labor Law section makes a distinction between a "repair" and "routine maintenance" such that the telephone repair in the case at hand is considered to be "routine maintenance" and thus not within the statute's protection.

Labor Law §240(1) states, in pertinent part, as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so

constructed, placed and operated as to give proper protection to a person so employed.

The Court of Appeals has explained that Labor Law § 240(1) "imposes absolute liability on owners and contractors for any breach of the statutory duty that proximately causes injury" (*Abbatiello v Lancaster Studio Associates*, 3 NY3d 46, 781 NYS2d 477, 814 NE2d 784 [C.A.2004]). Therefore, the Court of Appeals has coordinately recognized that "[t]he critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury'" (*Panek v County of Albany*, 99 NY2d 452, 758 NYS2d 267, 788 NE2d 616 [C.A.2003], *quoting Joblon v Solow*, 91 NY2d 457, 672 NYS2d 286, 695 NE2d 237 [C.A. 1998]). "Only work that involves the erection, demolition, repairing, altering or painting of a building or structure enjoys the protection of Labor Law § 240(1)" (*Wein v Amato Properties, LLC*, 30 AD3d 506, 816 NYS2d 370 [2nd Dept. 2006]). That is, insofar as it is applicable herein, "repairs" implicate Labor Law §240(1) liability whereas "routine maintenance" does not. However, delineating between routine maintenance and repairs is frequently a close, fact-driven issue and in determining whether plaintiff in the case at bar was engaged in a "protected activity" under the Labor Law, this Court is guided by factors previously considered by other Courts in deciding whether a task constitutes "repair" or "routine maintenance." These factors include: (1) whether the device or component that was being fixed or replaced was one that was intended to have a limited life span and to require periodic adjustment or replacement (See, *Esposito v New York City Industrial Dev. Agency*, 1 NY3d 526, 770 NYS2d 682, 802 NE2d 1080 [C.A.2003]; *Deoki v Abner Properties*, 48 AD3d 510, 852 NYS2d 261 [2nd Dept. 2008]; *see also, Kerr v Louisville*

Housing, Inc., 2 AD3d 924, 769 NYS2d 616 [3rd Dept. 2003]); (2) whether the device or machine that was being "repaired" or "maintained" was actually inoperable (*See, Jones v Village of Dannemora*, 27 AD3d 844, 811 NYS2d 186 [3rd Dept. 2006]; *Barczykowski v Benderson Development Company, Inc.*, 4 AD3d 837, 771 NYS2d 406 [4th Dept. 2004]; *see also, Cohen v Columbia University in the City of New York*, 44 AD3d 533, 844 NYS2d 31 [1st Dept. 2007]; *Durkin v Long Island Power Authority*, 37 AD3d 400, 830 NYS2d 242 [2nd Dept. 2007]); (3) whether the work was a huge job that required many workers or many hours of labor or a single person job completed in a matter of minutes (*Azad v 270 5th Realty Corp.*, 46 AD3d 728, 848 NYS2d 688 [2nd Dept. 2007]; *DiBenedetto v Port Authority of New York and New Jersey*, 293 AD2d 399, 742 NYS2d 207 [1st Dept. 2002]; *see also Yong Ju Kim v Herbert Construction Company, Inc.*, 275 AD2d 709, 713 NYS2d 190 [2nd Dept. 2000]; *Juchniewicz v Merex Food Corporation*, 46 AD3d 523, 848 NYS2d 255 [2nd Dept. 2007]); (4) whether the work was "routine" task that was perhaps performed pursuant to some service contract or whether it was a non-routine job requiring special payment (*Arevalo v NASDAQ Stock Market, Inc.*, 28 AD3d 242, 813 NYS2d 383 [1st Dept. 2006]; *Bax v Allstate Health Club, Inc.*, 26 AD3d 861, 809 NYS2d 378 [4th Dept. 2006]; and (5) whether the job was merely one part of an ongoing construction project or a discrete activity (*Anderson v Olympia & York Tower B Company*, 14 AD3d 520, 789 NYS2d 190 [2nd Dept. 2005]; *Einstein v Board of Managers of the Oaks at La Tourette Condominium Sections I-IV*, 43 AD3d 987, 842 NYS2d 72 [2nd Dept. 2007]).

In support of their motion for summary judgment, defendants, MARX/SOBELMAN describe plaintiff's telephone work as routine maintenance. Relying

exclusively upon the holdings of the Court of Appeals in *Abbatiello v Lancaster Studio Associates*, *supra*, *Esposito v New York City Indus. Dev. Agency*, *supra*, and *Nagel v D&R Realty Corp.*, 99 NY2d 98, 752 NYS2d 581, 782 NE2d 558 [C.A.2002], without explaining how these holdings are applicable to the facts at hand, defendants, MARX/SOBELMAN, state conclusively that "[i]n this case, the plaintiff was performing 'routine maintenance' and in accordance with [*Abbatiello*, *Esposito* and *Nagel*], is not afforded the protections of the Labor Law, and therefore, his claims under Labor Law §§200, 240(1) and 241(6) should be dismissed" (*Marx/Sobelman Memo of Law*, Point II).

First, it well settled that, in order "to obtain summary judgment it is necessary that the movant *establish* his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor... and he must do so by tender of evidentiary proof in admissible form" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 118 [C.A. 1980] [emphasis added]). Here, defendants have failed to demonstrate how the facts of *Abbatiello* and *Esposito* are analogous to the facts at hand. Defendants also fail to support, both legally and factually, their conclusory assertions that plaintiff was engaged in "routine maintenance" and not repair.

Second, in this case, the undisputed facts are that plaintiff was an "outside field technician" with Verizon whose job duties, as he described, include "repairing defective telephone lines, phones and/or equipment." Plaintiff's work order for this specific job specified that "someone's phone was not working" and directed him to the "[r]ear wall terminal, Six Glen Street" (*Id*). At his deposition, plaintiff testified that the rear wall

terminal is a piece of telephone company equipment where dial tone comes in to a building before the dial tone is routed to a particular customer (*Goldsmith Tr.*, p. 82). The record is silent as to what the remedy for the malfunction at issue would have been (*cf. Abbatiello v Lancaster Studio Assocs.*, *supra* at 53). Nevertheless, based upon the papers submitted herein, this Court finds that the record does not permit the legal conclusion that the repairs in which plaintiff was engaged in at the time of his injury, the need for which was precipitated by a telephone malfunction leaving a commercial tenant at the subject premises without phone service, involved, as defendants contend, no more than routine maintenance and were thus not "repair[s] within the statute's contemplation (*see e.g., Cohen v Columbia University of the City of New York*, *supra*.) Defendants' reliance upon the Court of Appeals *Abbatiello* and *Esposito* decisions is misplaced.[1] In *Abbatiello*, plaintiff, a cable repair technician, was dispatched by his employer to an apartment building owned by Lancaster Studio Associates in response to a complaint by one of the building's tenants. In the course of accessing a junction box on the exterior of the building, plaintiff's ladder bent, causing him to fall and sustain injuries. In holding that the plaintiff was engaged in "routine maintenance," the Court of Appeals stated,

> [p]laintiff determined that the cause of the defective signal was water in the tap, a common problem caused by rainwater accumulating in junction boxes affixed to building exteriors. The remedy would have been to loosen a few screws and drain the water from the tap and, if work out, replace the tap. These activities constitute routine maintenance and not repair as contemplated by Labor Law §240(1).

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[1]The Court of Appeals decision in *Nagel v. D&R Realty Corp.*, 99 NY2d 98 [2002], is inapplicable to plaintiff's Labor Law §240(1) claim; *Nagel* deals with the applicability of Labor Law §241(6), *see infra*.

(*Abbatiello v Lancaster Studio Assocs.*, *supra* at 53).

However, as stated above, the record in this case is silent as to what the remedy for the telephone service malfunction would have been. In fact, it is not clear from the testimony of the plaintiff if even he knew what needed to be worked on - whether it was the rear wall terminal itself or some other wiring or other equipment - in order to restore phone service to the commercial tenant. It is unclear what exactly needed to be repaired in order to restore phone service at the subject premises. Further, unlike the case at bar, the ladder upon which *Abbatiello* was standing to gain access to the junction box was one that was supplied by his employer. Also, unlike GOLDSMITH herein, *Abbatiello* knew exactly where the junction box was located at the subject premises and had previously performed work at that location. Further, *Abbatiello* was able to determine the cause of the defect that he was called to fix and knew exactly how to remedy the defect.

Similarly, the Court of Appeals decision in *Esposito* is also entirely distinguishable from the facts at hand. In *Esposito*, plaintiff, worker, was injured in a fall from a ladder while attempting to remove a cover from an air conditioning unit in order to replace components that were worn out due to normal wear and tear. The Court of Appeals ruled that the accident was not covered by the statute because the worker was performing routine maintenance rather than repair work or other covered activity. However, unlike the plaintiff in this case, *Esposito* was clearly performing a monthly maintenance check of the air conditioning units on the 22nd through the 29th floors of the commercial building in Manhattan. His job specifically included taking amperage readings and checking bolts, sheaves and bearings. Upon his discovery of a low

amperage reading and heavy vibrations, which suggested to him that the motor was worn and loose, he returned with tools and parts needed to fix the machine.

It is the judgment of the Court that the plaintiff herein was not at the subject premises as part of a monthly maintenance or an otherwise regularly scheduled maintenance check of the phone service and equipment. GOLDSMITH reported to 6 Glen Street on the day of the accident as a result of a specific, written work order from his employer, Verizon. Also, there is no indication that the work here involved replacing components that require replacement in the course of normal wear and tear. Accordingly, the Court does not find that GOLDSMITH's job in this case constituted routine maintenance, but was rather a repair. There was nothing routine about this job. In the absence of the work order, plaintiff simply would not have been at the subject premises.

At the time of his accident, plaintiff was searching for the rear wall terminal. However, because his work and job duties were not going to terminate upon the mere discovery of the rear wall terminal, such that plaintiff (and/or his partner) were *actually* going to do the repair work necessary to restore phone service, the activity plaintiff was engaged in at the time of his injury - namely searching for the rear wall terminal- cannot be called merely investigatory and thus outside the protections of the Labor Law Section (*cf. Martinez v City of New York*, 93 NY2d 322, 690 NYS2d 524, 712 NE2d 689 [C.A. 1999]).

Further, that plaintiff did not actually do any repair work does not preclude the finding that he was engaged in a Labor Law protected activity at the time of the accident. The Court of Appeals has repeatedly recognized that Labor Law §240(1) is

"'for the protection of work[ers] from injury and undoubtedly is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed'" (*see e.g.*, *Melber v 6333 Main Street, Inc.*, 91 NY2d 759 [C.A. 1998]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 679 NYS2d 104, 698 NE2d 933 [C.A. 1985], *rearg. denied* 65 NY2d 1054 [C.A. 1985]). Consistent with this purpose, Appellate Courts have held that the statute establishes absolute liability for a breach which proximately causes an injury (*Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880, 488 NE2d 810 [C.A. 1985]), has treated the statutory duty as nondelegable (*Del Vecchio v State of New York*, 246 AD2d 498, 667 NYS2d 401 [2nd Dept.1998]) and has broadly construed the statute's terms in a variety of circumstances (*see e.g.*, *Joblon v Solow*, *supra*).

In light of defendants MARX/SOBELMAN's failure to make a *prima facie* showing of entitlement to judgment as a matter of law on its motion for dismissal of plaintiff's Labor Law §240(1) claims, the Court denies defendants' motion without regard to the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, *supra*).

Similarly, the COFFEE SHOP's motion for summary judgment dismissing plaintiff's Labor Law §240(1) claim is also denied without regard to opposing proof (*Id*). The COFFEE SHOP Defendants' sole argument, advanced without the support of any legal authority, is that the activity plaintiff was engaged in at the time of his accident is not a protected activity under the Labor Law section, i.e., that it is routine maintenance and not repair. For the reasons stated above, this Court finds that plaintiff was engaged in the *repair* of phone service at the subject premises and thus was owed the protections of Labor Law §240(1).

Based on the foregoing, plaintiff's are entitled to an order granting them partial summary judgment on their Labor Law §240(1) claims on the basis of strict liability as against MARX/SOBELMAN and their motion is granted.

Labor Law §241(6)

Relying upon the Court of Appeals decision in *Nagel v D&R Realty Corp.*, *supra*, defendant, MARX/SOBELMAN argues that plaintiff's Labor Law §241(6) claims as against it should be summarily dismissed because this provision does not cover "routine maintenance." Defendants, MARX/SOBELMAN, also argue that there is no evidence that the subject ladder and platform at defendants' premises constituted a statutory violation. Specifically, MARX/SOBELMAN argue that, as an out of possession owner of the subject premises, it cannot be held liable for injuries that occur at the premises, despite the fact that it reserved a right of re-entry, because plaintiff fails to allege that the dangerous condition - i.e., the ladder - was a result of a specific statutory violation. MARX/SOBELMAN submit that plaintiff's allegations in his supplemental bill of particulars and CPLR §3101 (d) exchange, alleging that the New York State Building Construction Code §765.4(a)(11) and § 765.4(a)(9) were violated but only if the subject ladder is deemed to be a "stairway" by this Court, fall short of demonstrating a specific statutory violation on their part.

Similarly, the COFFEE SHOP Defendants' sole argument in support of their motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim is that plaintiff's actions, in attempting to repair a telephone line, did not constitute construction, excavation or demolition work and therefore not covered by Labor Law §241(6). Said argument is legally unsupported and wholly conclusory. The COFFEE SHOP

Defendants maintain that under Labor Law §241(6), plaintiff is precluded from asserting a cause of action because he was merely performing routine maintenance.

Labor Law §241(6) states, in pertinent part, as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> ***
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.***

The Court of Appeals in examining Labor Law §241(6) has summarized that "section 241(6) covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, *supra*). It has also advised that "we look to the regulations contained in the Industrial Code (12 NYCRR 23-14[b][13]) to define what constitutes construction work within the meaning of the statute" (*Joblon v Solow*, *supra*).

The Code's definition of "construction work", in 12 NYCRR §23-14(b)(13), includes repairing a building and installing equipment.[2] This court has already found

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[2]More specifically, the provision 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, whether or not such work is performed in proximate relation to a specific building or other structure and includes, by way of illustration but not by way of limitation, the work of hoisting, land clearing, earth moving, grading, excavating, trenching, pipe and conduit laying, road and bridge construction, concreting, cleaning of the exterior surfaces including windows of any building or other structure under construction, equipment installation and the structural installation of wood, metal, glass, plastic, masonry and other building materials in any form or for any purpose."

that plaintiff was engaged in *repairing* a structure at the subject premises when the accident occurred. Such work similarly qualifies as "construction work" under the Industrial Code regulation and, in turn, Labor Law § 241(6). Thus, the COFFEE SHOP Defendants' motion for summary judgment dismissing plaintiff's Labor Law §241(6) claim is denied.

Turning to MARX/SOBELMAN's argument that plaintiff failed to allege a specific statutory violation, it is noted that, in their pleadings, plaintiffs claim violations of 12 NYCRR §§23-1.7(e), 23-2.1, 23-1.7(b)(1), 23-1.21(b)(1), 1.21(b)(3)(iv), 1.21(b)(4)(I), 1.21(b)(4)(ii), New York State Building Construction Code §§765.4(a)(11), 765.4(a)(9) (*Complaint*, ¶50; *Bill of Particulars*, ¶18; *Supplemental Bill of Particulars*).

In 2005, the Court of Appeals recounted that Labor Law § 241(6) "creates a cause of action against owners and contractors, making them vicariously liable for the negligence of others whom they did not supervise, where and only where 'a specific, positive command' (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [C.A.1993]) or a concrete specification (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 [C.A.1998]) of a regulation promulgated by the Commissioner of Labor pursuant to the statute has been violated" (*Tolfer v Long Island R.R.*, 4 NY3d 399, 795 NYS2d 511, 588 NE2d 614 [C.A.2005]). Hence, "[t]o prevail under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision which sets forth a specific standard of conduct" (*Saleh v Saratoga Condominium*, 10 AD3d 645, 783 NYS2d 588 [2nd Dept. 2004]).

In addition, "to support a cause of action pursuant to Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of the accident" (*Biafora v. City of New York*, 27 AD3d 506, 811 NYS2d 764 [2nd Dept. 2006]). Here, defendants, MARX/SOBELMAN, have failed to make a *prima facie* showing (1) that plaintiff either relied upon a general safety standard or one reiterating a generalized common-law principle *or* (2) demonstrated that those cited provisions containing the requisite concrete specificity are inapplicable in this case (*Walker v Ekleco Co.*, 304 AD2d 752, 757 NYS2d 762 [2nd Dept. 2003]).

12 NYCRR §23-1.21(a) and (b), entitled ladders and ladderways, present specific standards that could support a Labor Law § 241(6) claim. Plaintiff cites, for example, §23-1.21(b)(1) which provides that "[e]very ladder shall be capable of sustaining without breakage, dislodgement or loosening of any component at least four times the maximum load intended to be placed thereon." In addition, §23-1.21(b)(3)(iv) provides that "[a]ll ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist: (iv)[i]f it has any flaw or defect of material that may cause ladder failure."

Accordingly, it is the judgment of the Court that defendant, MARX/SOBELMAN's has not established judgment as a matter of law and its motion for summary judgment dismissing plaintiff's Labor Law §241(6) claims is also denied.

Labor Law §200 and Common Law Negligence

"Labor Law § 200 codified the common-law duty of an owner or employer to provide employees with a safe place to work" (*Brown v Brause Plaza, LLC*, 19 AD3d 626, 798 NYS2d 501[2nd Dept. 2005]). "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son*, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 [C.A. 1981]). Thus, "[f]or an owner to be held liable under Labor Law §200, plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident" (*Lioce v Theatre Row Studios*, 7 AD3d 493, 776 NYS23d 89 [2nd Dept. 2004]; *see also, Pilch v Board of Education of City of New York*, 27 AD3d 711, 815 NYS2d 617 [2nd Dept. 2006]).

In support of their motion for summary judgment dismissing plaintiff's Labor Law §200 claims, defendants, MARX/SOBELMAN, argue that there is no evidence that the ladder or platform, which was constructed by a contractor hired by the tenant, VILLATORO, constituted a dangerous or hazardous condition or that they had notice of it. Defendants submit that, at his sworn deposition, Ret Sobelman, testified that he was not even aware that the ladder or platform existed at the rear of the premises, nor was he aware of any prior incidents involving it.

First, it cannot be overlooked that the record herein shows that, prior to the building of the platform and ladder at the rear of its restaurant, defendant, VILLATORO, contacted WALTER SOBELMAN (Ret Sobelman's father), an owner of the subject

premises, who did not object to the construction of the platform and ladder and after they were built, he came to look at the same. Thus, there remains a questions of fact as to whether WALTER SOBELMAN, an owner of the premises, had actual knowledge of the dangerous condition - i.e., the ladder - involved in plaintiff's accident for years before said accident.

Further, pursuant to the lease agreement with the COFFEE SHOP Defendants, the owners of the subject premises, MARX/SOBELMAN, (*Answer*, ¶6), reserved a right of re-entry to the subject premises. Specifically, paragraph 6 of the lease agreement, signed by Ret Sobelman as Vice President, states as follows:

> 6th. The said Tenant agrees that the said Landlord's agents and other representatives shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs aor alterations therein as may be necessary for the safety and preservation thereof.

At his deposition, Ret Sobelman admitted that, according to the lease agreement with the tenant, VILLATORO, the Landlords, MARX/SOBELMAN, reserved a right of re-entry (*Sobelman Tr.*, p. 43). Accordingly, keeping in mind that WALTER SOBELMAN was aware of the ladder and platform, the Court finds that there remains an issue of fact as to whether defendants, MARX/SOBELMAN, as owners of the premises, albeit out of possession owners, but with a reserved right of re-entry to the premises, had constructive notice of the dangerous condition (*DiRende v Cipollaro*, 234 AD2d 78, 650 NYS2d 695 [1st Dept. 1996] *lv. denied* 90 NY2d 806 [C.A. 1997]), and otherwise had a duty to use reasonable care to keep its premises in a reasonably safe condition for the

protection of all persons whose presence is reasonably foreseeable (*Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 [C.A.1976]).

Based upon the outstanding issues, the Court finds that defendants, MARX/SOBELMAN's failure to make a *prima facie* showing of entitlement to judgment as a matter of law as to the dismissal of plaintiff's Labor Law §200 and common law negligence claims, requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, *supra*).

Finally, the COFFEE SHOP Defendants, in moving for summary judgment dismissing plaintiff's Labor Law §200 and common law negligence claims, argue that they were unaware that plaintiff would be entering the restaurant and going into the back room behind the kitchen. Defendants claim that plaintiff's presence in the restaurant was unauthorized and therefore they did not exercise any control or supervision over his actions. Defendants also argue that they had no notice, actual or constructive, that the stairway was dangerous or unsafe because VILLATORO and his son had used it many times without incident prior to plaintiff's fall. Defendants also argue that there was no way of knowing that third parties would be accessing that area, as that had only happened once in the almost twenty (20) years since the construction of the stairs and then, with their permission. Finally, the COFFEE SHOP Defendants argue that plaintiff's injury arose out of his own method of operation - that is, he failed to use the ladder provided by Verizon to access the rear wall terminal.

It is the judgment of the court that the COFFEE SHOP Defendants have failed to carry their *prima facie* burden. Defendants have failed to eliminate issues of fact

concerning their liability to the plaintiff under the Labor Law §200 and common law negligence. Defendants have admitted to building the platform and ladder to the rear of their restaurant in 1989 through the services of a contractor. Yet they have failed to eliminate questions of fact that the ladder at issue was in a dangerous and hazardous condition from the time that it was constructed up until the time of plaintiff's accident in 2005.

Further, there remain issues of fact about whether Margarita Escobar, an employee of the COFFEE SHOP Defendants, who was working in the subject kitchen at the time of p]laintiff's accident, did not have notice of plaintiff's presence at the restaurant or the kitchen. While it is undisputed that neither Margarita nor the other employees of the restaurant spoke any English, Margarita's own testimony, that she recalled two (2) men passing by through the restaurant to the back, that they tried to communicate to her prior to going in the back room in the kitchen, albeit in English, and that she did not prevent them from going on through the kitchen to the back door, present issues of fact as to defendants' knowledge of plaintiff and his partner's presence and whether their presence was authorized.

Further, defendant's claim that they could not have foreseen plaintiff's presence on the premises is also contradicted by the testimony of VILLATORO himself, who stated that there was one (1) time prior to the accident that someone other than VILLATORO or his son used the stairs and that this use was also by way of a telephone company employee who asked permission to go and look at the wires in the shaft.

For these reasons, the COFFEE SHOP Defendants' motion for summary judgment dismissing plaintiff's Labor Law §200 and common law indemnification claims is denied, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, *supra*).

Indemnification

Finally, defendants MARX/SOBELMAN's motion for an Order granting them partial summary judgment declaring that defendant, VILLATORO, is contractually obligated to defend and indemnify MARX/SOBELMAN is denied. Such an Order is premature when there are outstanding issues of fact regarding movant's contributory negligence, if any (*see*, *Farduchi v United Artists Theater Circuit, Inc.*, 23 AD3d 613, 804 NYS2d 786 [2nd Dept. 2005]; *Belcastro v Hewlett-Woodmere Union Free School Dist. No. 14*, 286 AD2d 744, 730 NYS2d 535 [2nd Dept. 2001]).

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 26, 2009

WILLIAM R. LaMARCA, J.S.C.

ENTERED

APR 01 2009

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