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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

NAN TAIXI, Plaintiff, - against - J & S NORTHERN, LLC, et al., Defendants.	INDEX NO. 24083/2007 MOTION DATE July 14, 2009 MOTION CAL. NO. 16 MOT. SEQ. NUMBER 1

The following papers numbered 1 to 10 read on this motion by the defendants J & S Northern, LLC and Medis East Inc. d/b/a Silvercare or Median s/h/a Silver Care Home Medical Equipment for summary judgment dismissing the plaintiff's complaint. The plaintiff cross-moves for summary judgment on his claims pursuant to Labor Law §240[1] and §241[6].

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
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Upon the foregoing papers the motion and cross-notion are determined as follows:

In this action, the plaintiff seeks to recover for injures he sustained while working at a premises owned by the defendants located at 150-05 Northern Boulevard. On July 30, 2007, the day of the accident, the plaintiff was employed by Digi Sign which had been hired to install a sign over the front exterior entrance of the premises.

At the time of the accident, the plaintiff was standing on a ten foot A-frame ladder which he had scaled because his boss, Mr. Kim, had asked for his help. The plaintiff averred at his deposition that he had one foot on the second rung from the top of the ladder and that his other foot was on the third rung. He also stated that the A-frame ladder was already set up before he climbed it, but he was unaware by whom, and that he had been on the ladder for no less than five and perhaps up to 30 minutes before the accident happened.

The plaintiff asserts that the accident occurred as he was holding the sign when the ladder twisted to the left and he and the ladder began to fall. When the plaintiff realized that he was falling, he stated he jumped off the ladder and was injured when he struck the ground.

The plaintiff testified that he had used the subject ladder before, but had done so "unwillingly". The plaintiff acknowledged that the ladder had twisted during use on other jobs, that he was aware that the locking hinges "not work very well", and that his boss was aware of the problem with the ladder.

The plaintiff averred that a total of five ladders were brought to the current job site by his employer on the day of the accident, specifically two straight ladders and three A-frame ladders. When asked at the deposition whether he made an "attempt" to use another A-frame ladder at the site the plaintiff responded: "Other ladders were too small, too low, only one and possibly another one was high enough for the job."

In the complaint, the plaintiff asserts causes of action based upon sections 240[1], 241[6] and 200 of the Labor Law.

The basis of the branch of the defendants' motion to dismiss the plaintiff's claim pursuant to Labor Law §240[1] is the assertion that the plaintiff was the sole proximate cause of his accident (See, Blake v Neighborhood Hous. Servs. of N.Y. City, Inc., 1 NY3d 280). A defendant demonstrates entitlement to judgment as a matter of law on a sole proximate cause defense by proffering proof that "adequate safety devices are provided and the worker either chooses not to use them or misuses them" (Cherry v Time Warner, Inc., ____ AD3d ____, 2009 NY Slip Op 6226; see also, Robinson v East Med. Ctr., LP, 6 NY3d 550; Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 40; Montgomery v Fed. Express Corp., 4 NY3d 805, 806).

Here, the defendant did not produce any independent evidence in support of its motion, but instead chose to solely rely on the deposition testimony of the plaintiff, as the basis for its requested relief. Contrary to the defendants' assertion however, the plaintiff's deposition testimony fails to establish prima facie that he was the sole proximate cause of the accident.

The plaintiff's testimony did not establish in the first instance, as a matter of law, that other "adequate" safety devices were at the site. The plaintiff only stated that there was "possibly" another ladder at the location that was "high enough for the job".

Further, even if another "adequate" ladder was at the site, the plaintiff's testimony does not demonstrate as a matter of law it was, in fact, "available" for the plaintiff to use (See, Reaber v Connequot Central School District, 57 Ad3d 640, 642). Specifically, when asked at his deposition "[w]ho was using the other [ladder] that might have been high enough for the job" the plaintiff answered: "Because of work everything was in a hurry and that one was right there". While this answer could be interpreted to substantiate defendant's claim that another ladder was at the job site, it certainly does not demonstrate, when coupled with the accompanying testimony, that the "other" ladder was not in use at the time plaintiff was requested to help and that plaintiff chose not to avail himself of it.

With respect to the branch of the plaintiff's cross-motion for summary judgment, the plaintiff has established, prima facie, that the ladder which the plaintiff was using failed to provide him with proper protection and the failure of that safety device was the proximate cause of the accident (See e.g., Boe v Gammarati, 26 AD3d 351). In opposition, the defendant failed to raise an issue of fact that the plaintiff was the sole proximate cause of his accident.

While there is some proof that the plaintiff was aware that the ladder he was using was insufficient for the task at hand, there is, on the other hand, no definitive proof that another "adequate" ladder was at the site, that it was actually available to the plaintiff and that the plaintiff affirmatively chose not to use that device (Cf., Robinson v East Med. Ctr., LP, supra at 554). In addition, since the plaintiff's boss was at the job, asked for the plaintiff's assistance and the plaintiff utilized a ladder that was already set up, it appears that the plaintiff was not acting solely on his own when he ascended the A-frame ladder, but was acting with the tacit approval of his supervisor (See, Rico-Castro v Do & Co New York Catering, Inc., 60 AD3d 749, 750).

Accordingly, the branch of the plaintiff's cross-motion for summary judgment on his claim pursuant to Labor Law §240[1] is granted.

The defendants also seek summary dismissal of the plaintiff's cause of action alleging violation of section 241[6] of the Labor Law. The plaintiff cross-moves for summary judgment on this same claim. Section 241[6] of the Labor Law provides, inter alia, that areas in which construction is being performed shall be "guarded, arranged, operated, and conducted" in a manner which provides "reasonable and adequate protection and safety to the persons employed therein," that the Commissioner of Labor may make rules to implement the statute, and that owners, contractors, and their agents shall comply with them (See, Rizzuto v L.A. Wenger Contracting Co., Inc., 91 NY2d 343). The duty imposed by Labor Law § 241[6] upon owners and contractors is also nondelegable and exists regardless of their control and supervision of the job site (See, Rizzuto v L.A. Wenger Contracting Co., Inc., supra; Whalen v City of New York, 270 AD2d 340).

In order to prove a cause of action pursuant to Labor Law § 241[6], a plaintiff must show that a defendant "violated a rule or regulation of the Commissioner of Labor that sets forth a specific standard of conduct as opposed to a general reiteration of common-law principles" (Adams v Glass Fab, Inc., 212 AD2d 972, 973). The regulation upon which a plaintiff relies must "set forth 'a specific standard of conduct as opposed to a general reiteration of common-law principles' for its violation to qualify as a predicate for a Labor Law § 241(6) cause of action" (Mendoza v Marche Libre Associates, 256 AD2d 133, quoting Adams v Glass Fab, 212 AD2d 972, 973; Quinlan v City of New York, 293 AD2d 262).

In his complaint, the plaintiff claims the defendants violated six provisions of the Industrial Code, to wit 12 NYCRR §§23-1.5, 23-1.15, 23-1.16, 23-1.17, 23-1.22 and 23-1.24. In his amended verified bill of particulars, the plaintiff also claims the defendants violated

Industrial Code sections 23-1.5[a][c], 23-1.21[a], 23-1.21[b][1], [b][3][i], [ii] and [iv], [b][4][ii] and [b][8], [c][2][i] and [ii][a], 23-1.21[e][2], [3] and [5].

In opposition to the motion, the plaintiff only offers arguments in support of eight Industrial Code sections, namely 12 NYCRR §§23-1.21[a], [b][1], [b][3][i], [ii] and [iv], [b][8] and [e][2] and [3]. Any claims as to the remainder of the Industrial Code violations alleged by the plaintiff in his complaint and amended bill of particulars are dismissed since the plaintiff has abandoned his reliance on these sections by failing to address their viability in his opposition papers (See, Musillo v Marist College, 306 AD2d 782, 783).

The only arguments made by the defendants in support of their motion for summary dismissal of these claims were that the aforementioned sections were not pleaded in the complaint and that these violations were not a proximate cause of the accident. The fact that the sections of the Industrial Code relied upon by the plaintiff for relief herein were not pled in his complaint is meaningless (See, Dowd v City of New York, 40 AD3d 908, 911; Latino v Nolan & Taylor-Howe Funeral Home, Inc., 300 AD2d 631). In any event, these sections were timely and affirmatively pled in the plaintiff's amended bill of particulars.

As to the defendants' proximate cause argument, the assertion that the plaintiff's affirmative decision to jump from the ladder nullified any statutory violation by the defendants is meritless. The court ruled, supra, that the defendants failed to establish the viability of a sole proximate cause defense in this action. Moreover, the testimony is clear that the plaintiff's decision to jump was made only after the ladder failed, he realized he was falling and was forced to jump off.

Turning to the branch of the plaintiff's cross-motion for summary judgment on his claim pursuant to Labor Law §241[6], the plaintiff failed to establish, prima facie, entitlement to judgment as a matter of law on this claim. In support of the cross-motion, the plaintiff only expressly asserts that judgment should be granted as a matter of law on sections 23-1.21 [b][8] and [e][2] and [3]. As to section 23-1.21[b][8], that section requires that A-frame type ladders come equipped with locking type spreaders. However, there is no proof in the record that the ladder in question was not so equipped (See, Cruz v Seven Park Ave. Corp., 2004 NY Slip Op 51417U [Sup Ct, Kings Cty]). The plaintiff's reliance on 23-1.21[e][2] is misplaced as that section "does not set forth a concrete regulatory violation sufficient to sustain a cause of action under Labor Law § 241[6]" (Fairchild v Servidone Constr. Corp., 288 AD2d 665, 667). Concerning section 23-1.21[e][3], that regulation states as follows: "Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means". In the present case, the plaintiff failed to establish in the first instance that the ladder at issue was not properly placed. Indeed, it appears the plaintiff's claim is that the ladder itself is defective. The remaining portion of the code section is not applicable to the facts of

this case since the plaintiff testified that the ladder at issue was ten feet tall and that he was not standing on the top of the ladder when it failed.

The branch of the motion by the defendants to dismiss the plaintiff's Labor Law §200 claim is granted. Section 200 of the Labor Law "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (Comes v New York State Elec & Gas Corp, 82 NY2d 876, 877).

Insofar as the manner of the performance of plaintiff's work is concerned, liability will attach to the landowner only if the owner exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe practice causing the accident (See, Comes v New York State Electric and Gas Corporation, 82 NY2d 876). In the present case, there is absolutely no proof in the record that the defendants exercised any control over how the plaintiff or his employer accomplished the tasks they were contracted to complete. Even if the moving defendants had representatives present during the work who exercised general supervisory duties over the project this would not give rise to liability as there was no proof adduced that these defendants had "actual authority to control the activity [that brought] about the injury" (Reilly v Newireen Associates, 303 AD2d 214; see also, Martin v Paisner, 253 AD2d 796; Putnam v Karaco Industries Corporation, 253 AD2d 457).

Accordingly, the branch of the defendants' motion for summary judgment dismissing the plaintiff's claim pursuant to Labor Law §200 is granted.

Dated: October 8, 2009

Peter J. Kelly, J.S.C.