

**Caswell v Trustees of Columbia Univ. in the City of  
N.Y.**

2010 NY Slip Op 30723(U)

March 30, 2010

Supreme Court, New York County

Docket Number: 108249/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

THOMAS CASWELL and CHRISTINA CASWELL,

INDEX NO. 108249/2007

Plaintiffs,

MOTION DATE \_\_\_\_\_

- against -

MOTION SEQ. NO. 001

TRUSTEES OF COLUMBIA UNIVERSITY IN THE  
CITY OF NEW YORK,

MOTION CAL. NO. \_\_\_\_\_

Defendant.

The following papers, numbered 1 to 5, were read on this motion by defendant for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240(1) and 241(6) claims, and motion by plaintiff for partial summary judgment on the issue of liability under Labor Law § 240(1).

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

3, 4

Replying Affidavits (Reply Memo) \_\_\_\_\_

5

Cross-Motion:  Yes  No

**FILED**

APR 02 2010

NEW YORK  
COUNTY CLERK'S OFFICE

This is a personal injury action by plaintiff Thomas Caswell ("plaintiff") and his wife Christina Caswell (collectively "plaintiffs") against defendant Trustees of Columbia University in the City of New York ("defendant" or "Columbia"), to recover damages for injuries allegedly sustained when plaintiff fell off a ladder while working on a fire alarm system upgrade project at Columbia University. The accident occurred when a fire alarm cable that plaintiff was pulling became stuck while plaintiff was on the ladder. Plaintiff brings claims under Labor Law §§ 200, 240(1) and 241(6), and for common-law negligence.<sup>1</sup> The parties completed discovery and a Note of Issue was filed on November 19, 2009. Defendant now moves for summary judgment, pursuant to CPLR 3212, dismissing the common-law negligence and Labor Law §§ 200, 240(1)

<sup>1</sup>Plaintiff's wife brings a derivative claim for loss of services.

and 241(6) claims as a matter of law. Plaintiff moves for partial summary judgment on the issue of liability with respect to his cause of action under Labor Law § 240(1).<sup>2</sup> The motions are consolidated for purposes of this decision, and plaintiff's motion will be considered a cross-motion.

#### BACKGROUND

In support of its summary judgment motion, defendant submits, *inter alia*, depositions of plaintiff and Columbia employee Edward Lauth; the incident report; photographs of the purported accident scene; and plaintiff's medical records. In opposition and in support of his cross-motion for partial summary judgment on liability, plaintiff submits, *inter alia*, the same depositions submitted by defendant; and the contractual agreement between his employer and defendant. The following relevant facts are undisputed.

On December 6, 2005, plaintiff was working as a foreman on a fire alarm system upgrade project at a Columbia University academic building known as Uris Hall. The building was owned by defendant, and plaintiff had been working at Uris Hall for about two to three months. He was employed by H & L Electric ("H&L"), which was a trade contractor retained by defendant to install the new system. H&L was responsible for supervising the safety of the project.

Plaintiff was working in an unfinished space in a sub-cellar for Uris Hall at around 9:00 a.m. He was working with H&L employees John Lineen, Jonathan Shann and Ernest Goodson. Their job that day was to pull the fire alarm cable. Plaintiff was standing on eight foot A-frame ladder that had been provided by H&L. There were puddles of water on the floor, and the ground where the ladder was placed was uneven with broken pieces of concrete. The ladder was "wobbly" because of the uneven ground, but plaintiff had set the ladder at the least wobbly

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<sup>2</sup>Although plaintiff's motion is not filed as a cross-motion, it is effectively a cross-motion.

location on the ground. Plaintiff had been on the ladder the day before and had no problems with it at that time.

While plaintiff was standing on the sixth step of the ladder pulling the fire alarm cable, the cable became stuck. He climbed the ladder and tried to "jiggle" it to get it unstuck. The ladder "wobbled" and plaintiff fell back. The ladder fell down and plaintiff landed on his right knee and twisted it. Lindeen was behind plaintiff and witnessed the accident, but the parties did not submit a deposition by Lindeen.

In the incident report prepared on December 7, 2005, it was noted that plaintiff was standing on a ladder pulling a wire that became stuck, and that he fell backwards when the wire became loose. Plaintiff agreed that the report gave an accurate description of what happened.

Edward Lauth, a director in charge of facilities management at Columbia, did not investigate the accident and was not aware of it prior to the instant litigation. He testified that he never gave plaintiff any instructions on how to use a ladder or how to use any safety equipment because that was H&L's responsibility.

DISCUSSION

Defendant moves for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200, 240(1) and 241(6) claims as lacking merit as a matter of law. Plaintiff opposes defendants' motion and cross-moves for partial summary judgment on the issue of liability with respect to his Labor Law § 240(1) claim. The motions are decided as follows.

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of

material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

#### B. Labor Law § 200 and Common-Law Negligence

Defendant argues that plaintiff's Labor Law § 200 and common-law negligence claims should be dismissed because defendant did not supervise, direct or control plaintiff's work, nor have notice of any hazardous conditions at Uris Hall. Plaintiff asserts that, even in the absence of control or supervision, defendant's liability may be predicated on the fact that it had notice of a hazardous workplace.

Labor Law § 200 is essentially a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*see Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]). Liability is limited to parties who exercise supervision or control over the work out of which the injury arises, or who create or have actual or constructive notice of an unsafe condition which causes the injury (*see Comes v New York State Elec. & Gas*

*Corp.*, 82 NY2d 876, 877 [1993]; *Colon v Lehrer, McGovern & Bovis, Inc.*, 259 AD2d 417, 419 [1st Dept 1999]).

The unrefuted evidence demonstrates that defendants did not exercise the requisite supervision or control over plaintiff's work. Further, plaintiff had worked on the project for two or three months without incident, and there is no indication that defendant had notice of any hazardous conditions. Therefore, defendant's motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims is granted (*see Romeo v Property Owner (USA) LLC*, 61 AD3d 491, 491-92 [1st Dept 2009] [Labor Law § 200 and common-law negligence claims were unsupported by evidence indicating that defendants had either notice of alleged hazardous tile condition or controlled and supervised the electrical work, where plaintiff testified that tile floor had appeared defect-free during the five days he worked at job site and at all times prior to accident, and where plaintiff's work instructions came only from subcontractor]).

C. Labor Law § 240(1)

Defendant requests dismissal of plaintiff's Labor Law § 240(1) claim on the basis that plaintiff's own negligence in continuing to pull on a cable that became stuck while he was on the ladder was the sole proximate cause of his accident. Defendant also asserts that there is no evidence that the ladder was defective in any way.

In opposition and in support of his cross-motion for partial summary judgment on liability, plaintiff argues that defendant's contention that he continued to pull on the cable is pure speculation and, further, that comparative negligence is not a defense to a section 240(1) claim. Plaintiff also contends that he has established prima facie entitlement to judgment as a matter of law because the unrefuted evidence demonstrates that there were no safety devices provided to protect him or secure the ladder and prevent it from wobbling. Specifically, he claims that the ladder was placed on uneven concrete without any safety equipment such blocks, wood, rubber guards, ropes, chains, safety belts or scaffolding.

Labor Law § 240(1), known as the “scaffold” law, imposes non-delegable, strict liability upon property owners and general contractors for certain types of elevation-related injuries that occur during construction (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The statute provides in pertinent part:

“All contractors and owners and their agents . . . 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.”

To establish liability under Labor Law § 240(1), the injured plaintiff must demonstrate (1) a violation of the statute, and (2) that such violation was the proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Serv.*, 1 NY3d 280, 287 [2003]; *Cherry v Time Warner, Inc.*, 66 AD3d 233, 236 [1st Dept 2009]). The statute can be violated either when no protective device is provided, or when the device provided fails to furnish proper protection. Once a plaintiff proves the two elements, the defendants are subject to absolute liability even if they did not supervise or exercise control over the construction site (*see Ross*, 81 NY2d at 500), and comparative negligence may not be asserted as a defense (*see Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39, 40 [1st Dept 2003]). Notwithstanding that section 240(1) is an absolute liability statute, if a plaintiff’s actions were the sole proximate cause of the accident, there is no liability (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Kosavick v Tishman Constr. Corp.*, 50 AD3d 287, 288 [1st Dept 2008]).

Traditionally, Labor Law § 240(1) has been construed to apply to elevation-related risks involving “falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross*, 81 NY2d at 501). In *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], however, the Court of Appeals clarified that the dispositive inquiry does

not depend upon whether the injury resulted from a "falling worker" or "falling object." According to *Runner*, "the governing rule is . . . that 'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*'" (*id.* [quoting *Ross*, 81 NY2d at 501] [emphasis in original]).

Here, the Court finds that plaintiff has established a prima facie violation of Labor Law § 240(1). "It is well settled that a failure to properly secure a ladder, to ensure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)" (*Kijak v 330 Madison Ave. Corp.*, 251 AD2d 152, 153 [1st Dept 1998]; *see also Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271 [1st Dept 1999]). Moreover, plaintiff is under no obligation to show that the ladder was defective in some manner, or to prove that the floor was slippery (*see Klein v City of New York*, 222 AD2d 351, 352 [1st Dept 1995], *aff'd* 89 NY2d 833 [1996]). To make out a section 240(1) violation, it "was sufficient to show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling" (*Bonanno v Port Auth. of N.Y. & N.J.*, 298 AD2d 269, 270 [1st Dept 2002]).

According to plaintiff's undisputed deposition testimony, the accident occurred when the eight foot A-frame ladder, which was placed on an uneven ground containing puddles of water, "wobbled" and fell back while plaintiff was attempting to get the fire alarm cable unstuck. It is unrefuted that no safety devices were provided to secure the ladder or protect plaintiff from the fall. Defendant has presented no eyewitness testimony disputing plaintiff's version of how the accident occurred. Plaintiff has thus met his initial burden of demonstrating a prima facie violation of the statute (*see Carlos v W.H.P. 19 LLC*, 280 AD2d 419, 419 [1st Dept 2001] ["[t]he improper placement of the ladder on an uneven sidewalk and the failure to secure it were

violations of Labor Law § 240(1)"]; *Peralta v American Tel. & Tel. Co.*, 29 AD3d 493, 494 [1st Dept 2006] ["[u]nrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warranted a finding that the owners were absolutely liable under Labor Law § 240(1)"]; *Greenidge v Anchor Constr., Inc.*, 303 AD2d 179, 179 [1st Dept 2003]; *Davis v Selina Dev. Corp.*, 302 AD2d 304, 305 [1st Dept 2003]; *Bonanno*, 298 AD2d at 270; *Kijak*, 251 AD2d at 153).

Defendant's argument that plaintiff was the sole proximate cause of the accident fails to raise an issue of fact or to entitle defendant to judgment as a matter of law (*see Bonanno*, 298 AD2d at 270; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]). Defendant's contention that the accident was caused by plaintiff's own negligence in continuing to pull on a stuck wire while he was on the ladder is mere speculation, and is unsupported by any evidence of record (*see Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [rejecting defendant's claim that plaintiff was sole proximate cause of fall from eight foot ladder where there was "no view of the evidence plausibly supporting that contention"]; *Davis*, 302 AD2d at 305 [defendant offered nothing more than mere speculation as to what might have occurred]; *Wasilewski*, 260 AD2d at 272). Furthermore, defendant's argument, at best, raises an issue of contributory negligence, which is not a defense to a Labor Law § 240(1) claim (*see Carlos*, 280 AD2d at 419; *Peralta*, 29 AD3d at 494; *Ernish*, 2 AD3d at 257).

Plaintiff has therefore established entitlement to judgment as a matter of law on the issue of liability, and defendant has failed to raise a triable issue of fact (*see Peralta*, 29 AD3d at 493-94; *Greenidge*, 303 AD2d at 179; *Klein*, 222 AD2d at 251-52). Accordingly, plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted; and defendant's motion for summary judgment on the Labor Law § 240(1) claim is denied.

D. Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to

provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). Liability may be imposed under section 241(6) even where the owner or contractor did not supervise or control the worksite (*see id.*).

To support a cause of action under section 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a rule or regulation of the Commissioner of the Department of Labor ("Industrial Code") that is applicable given the circumstances of the accident, and that sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*see Ross*, 81 NY2d at 502-04; *Cammon v City of New York*, 21 AD3d 196, 198 [1st Dept 2005]). A violation of the Industrial Code does not establish negligence as a matter of law, but rather is some evidence of negligence to be considered with other relevant proof (*see Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]). "Thus, once it has been alleged that a concrete specification of the [Industrial] Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused [the] plaintiff's injury" (*Rizzuto*, 91 NY2d at 350). If proven, the owner or contractor is vicariously liable without regard to his or her fault (*see id.*). The owner or contractor "may, of course, raise any valid defense to the imposition of vicarious liability under section 241(6), including contributory and comparative negligence" (*id.*; *see also Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 261 [1st Dept 2004]).

Defendant argues that plaintiff's Labor Law § 241(6) claim should be dismissed because plaintiff has not established an Industrial Code violation, and that his own conduct was the proximate cause of the accident. Plaintiff predicates his Labor Law § 241(6) claim upon alleged violations of 12 NYCRR 23.21(b)(4)(i), (ii) and (iv), which he argues are specific and applicable

to the facts of this case.<sup>3</sup>

The Court finds 12 NYCRR 23-1.21(b)(4) (i), (ii) and (iv) sufficiently specific to support a Labor Law § 241(6) cause of action (see *Hart*, 30 AD3d at 214; *Montalvo*, 8 AD3d at 176; *Sopha v Combustion Eng'g, Inc.*, 261 AD2d 911, 912 [4th Dept 1999]). However, 12 NYCRR 23-1.21(b)(4)(i) is inapplicable, as there is no evidence that the ladder was being used "as a regular means of access between floors or other levels in any building or other structure" (see *Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 871 [3d Dept 1998]).

Plaintiff has alleged sufficient facts to support the applicability of 12 NYCRR 23-1.21(b)(4) (ii) and (iv), which provide in pertinent part:

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings.

\* \* \*

(iv) 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. . . .

Plaintiff's undisputed testimony establishes that he was standing on the sixth step of an eight foot A-frame ladder at the time of the accident, and that no one held the bottom of the ladder or otherwise secured it against slippage. Since an issue of fact exists as to whether a violation of these provisions was the proximate cause of plaintiff's injuries, summary judgment is inappropriate (see *Hart*, 30 AD3d at 214; *Montalvo*, 8 AD3d at 176; *Liu v 98 Fourth Street Dev. Group, LLC*, 2009 WL 2780154, \*5 [Kings Co. 2009]). Accordingly, defendant's motion for summary judgment dismissing the Labor Law § 241(6) claim is denied.

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<sup>3</sup>In the bill of particulars, plaintiff also alleges violations of the Occupational Safety and Health Agency ("OSHA") standards and the following sections of the Industrial Code: 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.22, 23-2.1, 23-3.3, 23-5.1, 23-5.2, 23-5.10 and 23-5.3. His opposition and cross-motion do not address these sections, and the Court finds any claims premised upon them either abandoned or inapplicable. In addition, plaintiff's Labor Law § 241(6) claim may not be premised upon an alleged violation of OSHA (see *Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999] [alleged violations of OSHA standards do not provide a basis for liability under section 241(6)]).

For these reasons and upon the foregoing papers, it is,

ORDERED that defendant's motion for summary judgment is: (1) granted dismissing the Labor Law § 200 and common-law negligence claims; (2) denied as to the Labor Law § 240(1) claim; and (3) denied as to the Labor Law § 241(6) claim; and it is further,

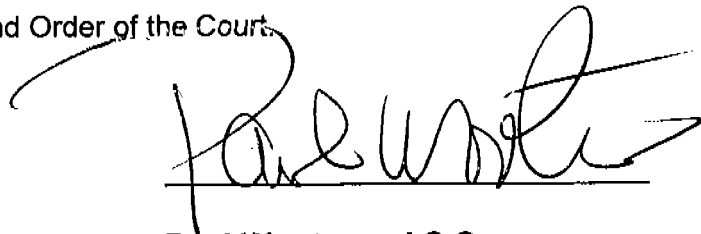
ORDERED that plaintiff's cross-motion for partial summary judgment on the issue of liability under Labor Law § 240(1) is granted; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that defendant shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: March 30, 2010



Paul Wooten J.S.C.

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