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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 401369/2008

SHULER, JACQUELIN

VS

BOVIS LEND LEASE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/2/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the Compliant of the plaintiff is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
JUL 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/8/10

J.S.C.
HON. CAROL EDMEAD

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

JACQUELIN SHULER,

Plaintiff,

-against-

BOVIS LEND LEASE LMB, INC.. and
CAULDWELL-WINGATE COMPANY, LLC,

Defendants.

----------X

Index No.: 401369/08

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action alleging negligence and violations of Labor Law §§200, 240(1) and 241(6), defendants Bovis Lend Lease Lmb, Inc. ("Bovis") and Cauldwell-Wingate Company, LLC ("Caldwell") (collectively, "defendants") move for summary judgment dismissing the Complaint of the plaintiff, Jacquelin Shuler ("plaintiff").

Factual Background

On October 27, 2007, plaintiff was working as a bricklayer for Deerpath Construction Corp. ("Deerpath") on the roof of the sixth floor of the building located at the United States Courthouse located at 40 Foley Square (the "building" or "worksite"). Cauldwell was the general contractor at the worksite and Bovis was the contract manager. It is alleged that plaintiff was injured when she attempted to re-enter the building from the roof through a window of the mechanical room adjacent to the roof outside the sixth floor, and slipped off of a radiator that was below the window.

Plaintiff alleges that there was no reasonably safe means of gaining access to the sixth floor from the area of the roof where she was assigned to do her work. According to the plaintiff's verified bill of particulars, the window was the sole ingress and egress being used by

all employees of Deerpath at the time of the accident.

In support of summary judgment, defendants argue that there was a safe procedure to enter and exit the sixth floor roof, using a door and proper ladders and pipe scaffolds where necessary, and that plaintiff was not required or expected to utilize the window. Plaintiff testified at her deposition as to the correct established safe procedure to enter and exit the sixth floor roof work area, and that she exited the roof under her own free will and judgment by choosing instead to climb through a window. In order to get to the roof in the first place, plaintiff took an elevator to the sixth floor, went up the stairs, and then went through an exit onto the roof. Plaintiff testified that before her accident had occurred she had left the roof of the sixth floor to use the bathroom on the sixth floor without incident. Plaintiff had to go to the bathroom again about a half hour later. Plaintiff then testified that when she wanted to use the bathroom she chose to climb through a window. She went into the building "feet first" and put her feet on top of the radiator. The radiator was "right next to the wall below the window." As she was coming through the window, she slipped and fell on the radiator. Photos identified at plaintiff's deposition depicting the subject window also depict the radiator which plaintiff claims caused her to slip and sustain her injury.

Frank Muhlbach ("Muhlbach"), an employee of Total Safety Consultants, the safety consultant during the renovation of the 40 Foley Square Courthouse, testified at his deposition that he investigated the accident and did not observe any unsafe practices by defendants. Muhlbach explained that in order to get from the elevators to the roof area, one would "take the corridor. Walk east. Make a left turn. Proceed to staircase F. Go up staircase F and you're close to the motor room." "There are ladders on either side of the bulkhead [at the motor room] for

workers to use to safely traverse the bulkhead and gain access to and from the roof." In his affidavit, Muhlbach again discusses the procedure to enter and exit the sixth floor roof work area.

John Stanton ("Stanton"), a foreman for Deerpath, testified at his deposition that plaintiff "got hurt coming through a window and - which was not the access that we installed for those work areas." Stanton recalled having seen one other worker previously use a window to get back in the building, and when he saw it, he "yelled at them." Stanton described ladders and pipe scaffold that had been provided to Deerpath workers for safe access to all of their roof work areas by means other than climbing through a window. In his affidavit Stanton further discusses the procedure to enter and exit the sixth floor roof work area.

Defendants argue that there was no elevation-related risk at the permanent window passageway as contemplated within Labor Law § 240(1). Not every worker who falls at a construction site gives rise to the extraordinary protections of Labor Law § 240(1). The window was a permanent fixture of the building being used or misused by plaintiff as a passageway from her workplace to some other place. Thus, Labor Law § 240 simply does not apply. Aside from the general inapplicability of Labor Law § 240(1) to the situation at hand, the present accident was plainly unforeseeable to the defendants, and foreseeability is a condition of Labor Law § 240(1) liability. Defendants did not fail to do anything; they provided plaintiff with safe means of ingress and egress with proper ladders and pipe scaffolds and a door into the building. However, plaintiff chose instead to do something not intended or expected from the defendants' point of view, as specifically testified to by Stanton, who yelled at the only other person he saw climbing through the window as plaintiff had. Additionally, putting aside from the general inapplicability of Labor Law § 240(1) to this action, plaintiff's conduct was the sole proximate

cause of her own accident. The regular means of access to the roof had not been removed; they were still there for plaintiff's use.

Nor was there a violation of, or even the necessary predicate pleading of a violation of an Industrial Code regulation of specific application to support plaintiff's Labor Law § 241(6) claim. Plaintiff's Complaint, Amended Complaint and Bill of Particulars are silent as to any such allegation.

Finally, there was no negligence on the part of the defendants to support a cause of action under Labor Law § 200 or the common law of negligence. Defendants are not even the owners of the property, did not expect, intend or desire that plaintiff or other workers use the window as a passageway, and there is no evidence that defendants had any notice of any condition about the radiator under the window that plaintiff was misusing. Stanton testified that he expected his workers including plaintiff to use the door, ladders and scaffolds provided for accessing the roof areas separated by the bulkhead structures, and corrected the one worker he had previously seen using a window instead. The record shows that defendants did not want, expect or intend for plaintiff to walk on the radiator under the window, and there is no basis at common law or Labor Law § 200(1) to hold them liable.

In opposition, plaintiff submits Deerpath's accident report ("Accident Report") which identifies Joseph Gaffney ("Gaffney"), Shuler's co-employee, as a witness to the accident. In his affidavit, Gaffney states that he was working with plaintiff when he became aware that she had an accident in entering part of the building through a window, which was used by the workers there to get into and out of the building and to use the bathroom. According to Gaffney, a week before the accident, Bovis's safety instructor, "Mobach" (sic) said that scaffolding should be

erected to get in and out of the window that plaintiff was using to get into the building. All of the workers working with Gaffney and plaintiff used the window to get in and out of the building, and at the time plaintiff had her accident there was no other way, except for use of the window for workers to have access to the building. According to Gaffney, there was no scaffolding allowing another way to get into the building from the place where "he and plaintiff were working."

Plaintiff also submits an affidavit of a New York State licensed professional engineer Ernest Gailor ("Gailor") who opined that the photograph depicting the interior of the machine room-which photograph also depicts the sole access window from the work site on the date of the accident-was in clear violation of Industrial Code 12 NYCRR 23-1.7(f). That provision, entitled "Vertical passage" provides: "Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided." 12 NYCRR 23-1.7(f) presents a specific command and standard sufficient to support a Labor Law§241(6) claim. Although this section was not previously identified in the Bill of Particulars, the Court should note that defendants were relieved of an order of preclusion by the court after the filing of plaintiff's note of issue and substantial discovery was conducted after the filing of the defendants' motion for summary judgment, including (1) the continuation of two depositions of defendants' witnesses, (2) a site inspection where photographs were taken by all parties, (3) the production of safety meeting reports never produced for over a year following the preliminary conference, (4) and further photographs submitted by defendants. Had these items been produced in compliance with multiple court orders before plaintiff filed her note of issue,

which was filed in reliance upon the court's preclusion order, plaintiff would have identified this section of the Industrial Code before the filing of the note of issue and before the defendants served their motion for summary judgment. Any alleged prejudice claimed by defendants in having no knowledge of this provision of the Industrial Code was brought about solely through defendants' own late compliance with discovery demands.

Plaintiff's Labor Law §240 claim is also supported by Gailor's opinion and substantiates that the exposure to the gravity related risk that plaintiff experienced giving rise to her accident constituted a violation. Plaintiff, of relatively diminutive height, was unable to bring her legs to extend to reach the radiator below the window in the machine room when she was accessing the window as the sole means of egress from her place of work on the sixth floor roof. Thus, when plaintiff slid off the window sill, intending to have her feet come into contact with the radiator below, she was exposed to a gravity related injury, which would have been avoided were an appropriate scaffold, ladder or other device situated by the general contractor to allow safe egress through the window. When plaintiff was unable to have her feet make safe contact with the radiator below, she lost her balance, slipped, and sustained her injury. Gaffney's Affidavit specifically relates the acknowledgment of Cauldwell's safety consultant Mulbach "that scaffolding should" have been "erected to get in and out of the window" that plaintiff was using as a means of egress at the time of the accident. Although defendants argue that the alleged scaffold/ladder precludes plaintiff from recovering for her fall, plaintiff contends that no scaffold existed and thus, there exists a material issue of fact as to whether there was an alternative means of egress and ingress from the work site in existence as would have allowed plaintiff to have avoided the gravity related risk she faced when she came through the window, attempting egress

from her work location to the courthouse's interior. The elevation differential between the window sill and the floor below was at least four feet, as can readily be observed in the photograph of the interior of the machine room and created a gravity related hazard which Section 240 is designed to redress. Bovis and Cauldwell can produce no document, photograph, memorandum or any other writing or form of physical proof substantiating that there existed a ladder and pipe scaffold scheme available to plaintiff to gain access to the building at the time of the accident. Further, all post accident safety discussions at safety meetings and safety reports by Deerpath, Bovis and Cauldwell fail to discuss any facts demonstrating that such an alleged means of ingress/egress from the exterior sixth floor roof to the interior of the building existed at the time of the accident or that plaintiff's conduct in using the window as a means of egress was improper, unsafe or unwarranted.

Gaffney's Affidavit also proves plaintiff's cause of action against Cauldwell under Labor Law§ 200. Gaffney's Affidavit establishes *prima facie* that Cauldwell's site safety manager Muhlbach, whose knowledge and statements are binding on Cauldwell, had actual knowledge a week before plaintiff's accident that "scaffolding" was "needed for the window." As there is *prima facie* proof that the unsafe means of egress was known to Cauldwell "a week before the accident," where with reasonable care Cauldwell could have effected a cure to the unsafe condition before plaintiff was injured, there is a *prima facie* showing of Cauldwell's liability for plaintiff's accident under Labor Law § 200 and the common law duty of an owner and contractor to exercise reasonable care to provide workers with a safe place to work.

In reply, defendants argue that Labor Law § 240 liability does not attach just because someone or something fell, but rather because, as contemplated in the statute, one of those events

occurred causing injury while a person was working at a height differential, or a while an load was being raised or lowered in a way that created a gravity-related risk. Those statutory circumstances are not present in the case at hand. It remains undisputed that plaintiff was not working at the window where the accident is alleged to have happened, nor was anyone raising or lowering loads there. The cases cited by plaintiff are distinguishable. In addition, the affidavit of plaintiff's engineer, Gailor, is completely incompetent to create a Labor Law § 240 case where none exists; it is not the province of a retained expert to say what the law is. Gaffney's affidavit also does not raise an issue of fact, first because it also cannot change the meaning of Labor Law § 240, but also because it relies on hearsay to attribute a statement to Muhlbach (not a Bovis or Cauldwell employee) that is inconsistent with his affidavit and deposition testimony. It also does not deny plaintiff's own testimony on having used the safe available method to get to her worksite earlier that day. Thus, Labor Law § 240 does not apply.

As to plaintiff's Labor Law § 241(6) claim, she could have alleged 12 NYCRR 23-1.7(f) before discovery. Plaintiff knew where and how she fell, and no discovery was required of the defendants to enlighten her pleadings or bill of particulars in this regard. In any event, plaintiff was provided with - and on her way to the work area did use - a safe means of access to the worksite. Plaintiff could have left the work area the same safe way that she herself testified that she arrived. Self-serving denials of the obvious cannot raise a genuine issue of fact. And, Gailor's affidavit is incompetent to create a Labor Law § 241 case where none exists. New York law does not authorize experts to create issues of fact by denying the plaintiff's own testimony that a safe route to her workplace was available. Gaffney's affidavit also does not raise an issue of fact, because again it relies on a hearsay statement of Muhlbach that is inconsistent with his

affidavit and deposition testimony, and it does not deny plaintiff's own testimony on having used the safe available method to get to her worksite earlier that day. As to plaintiff's Labor Law § 240 claim, nothing in plaintiff's opposing papers changes the fact that defendants are not the owners of the property and did not control Deerpath's work site.

Further, negligence elements including the existence of a dangerous condition and notice of any such imagined condition, have not been proven against defendants. There was no defective condition; the photos in the record show an ordinary window and an ordinary radiator under it. Plaintiff has never identified anything defective about it that caused her to fall.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172

[1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; Zuckerman, *supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Labor Law § 200

Labor Law § 200 is a codification of the common-law duty imposed on an owner or general contractor to provide construction site workers with a safe work site *(Nevins v Essex Owners Corp.*, 276 AD2d 315, 714 NYS2d 38 [1st Dept 2000]; *Employers Mut. Liab. Ins. Co. of Wis. v Di Cesare & Monaco Concrete Constr. Corp.*, 9 AD2d 379, 383 [1st Dept 1959]). In order to establish liability for common-law negligence or a violation of Labor Law § 200, the plaintiff must establish that the defendant in issue had "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, 317 [1981]; *see Rizzuto v Wenger Contr. Co.,* 91 NY2d 343, 352 [1998]; *Singleton v Citnalta Constr. Corp.,* 291 AD2d 393, 394 [2002]), or caused or had actual or constructive notice of the defective condition causing the accident (*Gdoviak v Southbridge Towers, Inc.,* 20 Misc 3d 1129, 872 NYS2d 690 [Sup Ct New York County 2008]; *see LaRose v Resinick Eighth Ave. Assoc., LLC,* 26 AD3d 470, 810 NYS2d 493 [2006]; *Gatto v Turano,* 6 AD3d 390, 391 [2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.,* 2 AD3d 548 [2003]; *Duncan v Perry,* 307 AD2d 249 [2003]; *Giambalvo v Chemical Bank,* 260 AD2d 432 [1999]; *Cuartas v Kourkoumelis,* 265 AD2d 293[1999]; *Sprague v Peckham Materials Corp.,* 240 AD2d 392 [1997]).

While it is undisputed that defendants were not owners of the worksite, it is undisputed that defendants were the general contractor and construction manager at the worksite. According to Muhlbach, a Total Safety employee who was produced at a deposition as a representative for Cauldwell, Cauldwell was the general contractor, who hired Deerpath as a subcontractors to "do the actual work." (Muhlbach EBT, pp. 11-12). To prevail on a common-law negligence and Labor Law § 200 claim against a general contractor or construction manager, a plaintiff must prove that the party so charged exercised direct supervisory control over the manner in which the activity alleged to have caused the injury was performed (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 836 NYS2d 130 [1st Dept 2007]; *Yong Ju Kim v Herbert Const. Co., Inc.*, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). As the movants, defendants failed to demonstrate in their initial moving papers that they lacked any supervisory control the work plaintiff was performing immediately before her accident, and the Court declines to address such argument raised for the first time in reply.

Defendants' mere statement that there is no evidence that they had any notice of any condition about the radiator under the window that plaintiff was misusing or that plaintiff was expected to use the door, ladders and scaffolds to access the roof areas, is insufficient. While the record indicates that workers such as plaintiff had access from the roof by using "a ladder to go over the bulkhead and down the bulkhead" or motor room, according to plaintiff "...there was no ladder" at the time of her accident (Plaintiff EBT, p. 44). Plaintiff testified that an A-frame ladder depicted in the photograph of the subject window was broken, was on the floor next to the radiator and that she would "sometimes step on it to get onto the radiator to step onto the windowsill (Plaintiff EBT, pp. 35-36). Defendants failed to establish that they lacked notice of the broken ladder which was utilized to provide access from the motor room to the roof. Further, Muhlbach, an employee of Total Safety Consultants, was produced as a "representative" of Cauldwell, and all parties acknowledged at Muhlbach's deposition, that his statements were binding on Cauldwell. It is noted that plaintiff testified that she "slipped and fell" on the radiator and that there "was something on the top of the radiator a piece of cloth or something . . . ." Defendants' papers are silent as to its lack of notice of this condition of the radiator. Therefore, dismissal of plaintiff's Labor Law § 200 and negligence claims is unwarranted, at this juncture.

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in relevant 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."

Labor Law § 240 (1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure (*Ernish v City of New York*, 2 AD3d 256, 768 NYS2d 325 [1st Dept 2003], *citing Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). In *Rocovich v Consolidated Edison Co.* (78 NY2d 509, 514, 577 NYS2d 219 [1991]), the Court of Appeals defined the scope of Labor Law § 240 (1) as encompassing special hazards inherent in elevation-related tasks (*Gill v Samuel Kosoff & Sons*, 229 AD2d 824 [3d Dept 1996]). The Court again addressed the scope of Labor Law §240 (1) in *Ross v Curtis-Palmer Hydro-Elec. Co.* (81 NY2d 494 [1993]), wherein it stated that the section "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*" (*supra*, at 501 [emphasis in original]). Thus, pursuant to Labor Law § 240 (1), owners and contractors have the duty to provide safety equipment to protect workers from hazards related to elevating themselves or their materials at the work site (*Drew v Correct Manufacturing Corp.*, 149 AD2d 893 [3d Dept 1989]). The statute imposes absolute liability upon owners, contractors and their agents where a breach of the statutory duty proximately causes an injury (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559, 606 NYS2d 127 [1993]; *Ross*, 81 NY2d 494, 500, *supra*; *Rocovich*, 78 NY2d 509, 513, *supra*). In other words, the owner or contractor must breach their statutory duty under Labor Law § 240 (1), and this breach must proximately cause the worker's injuries.

At the outset, the Court finds that Labor Law 240 (1) applies to the circumstances of plaintiff's alleged accident. Labor Law § 240 is designed to protect workers from hazards

associated with "gaining access to or working at sites where elevation poses a risk" (*Brooks v City of New York*, 212 AD2d 435, 436, 622 NYS2d 757, *quoting Rocovich v Consolidated Edison*, 78 NY2d 509, 514, 577 NYS2d 219 (noting that the safety devices enumerated under § 240 "are for the use or protection of persons in gaining access to or working at sites where elevation poses a risk")). Thus, access to and from the roof where plaintiff was assigned to perform her assignment from inside the building is covered under Labor Law § 240.

As to whether defendants established that they complied with Labor Law § 240 (1), *Berry v Triborough Bridge and Tunnel Auth.* (11 Misc 3d 1091, 819 NYS2d 846 [Sup Ct 2006]) is instructive. In *Berry*, plaintiff used one of the temporary ladders available to climb up from a platform to the area of an upper roadway where he was then assigned to work. At the end of his shift, he returned to the same place in the roadway to descend to the platform; however, the ladder was gone. He walked to two other areas where ladders had been placed, but those too were missing. Plaintiff claimed that he knew of no other means of access to or from the roadway besides the temporary ladders, so he tried to lower himself using the header above and the beams leading down to the platform below; as he did, however, his foot slipped off a plate and he fell ten to twelve feet to the platform below, injuring his ankle. The Supreme Court held that triable issues of fact existed as to whether plaintiff was injured as a result of the lack of a safety device enumerated in Labor Law § 240(1). A question existed as to whether the temporary ladders provided the sole access for plaintiff to get to and from his worksites.

Here, plaintiff testified at her deposition as follows:

Q. How did you get from the main floor to the sixth floor?
A. We took an elevator.
Q. When you got off the elevator you got off of the sixth floor?

A. Yes.
Q. Where did you go to then?
A. Up the stairs through an exit onto the roof.
Q. How did you get on the roof?
A. Up the stairs. Once you get off the elevator, go up a flight of stairs and there's an exit to the roof.
Q. Is that a door?
A. Yes, it's a door.
(Plaintiff's EBT, pp. 20-21)

Yet, plaintiff later testified that when she arrived at the roof the first time when she went up the stairs, she went through a window; "there is no door." (Plaintiff's EBT, pp. 20-21). Further, plaintiff elaborated as to the specific steps taken to and from the roof/work area from inside the building. When asked where the staircase to go down to the sixth floor was, plaintiff stated, "When you get off the roof you go through a window and you have to walk a distance to the exit" (Plaintiff's EBT, p. 26). According to plaintiff, you have to leave the roof by going through a window, which leads into some type of "heating room;" she then stated "I leave there and I have to walk like five feet to another exit, another doorway, and then I walk from there a distance to the exit." (Plaintiff's EBT, pp. 27-28). Plaintiff then confirmed that the exit was where the stairs are. (Plaintiff's EBT, p. 28). Plaintiff testified that she would use the window every morning to get to the roof area to work and every time she wanted to leave the area (Plaintiff EBT, p. 29).

Muhlbach explained that in order to get from the elevators to the roof area, one would "take the corridor. Walk east. Make a left turn. Proceed to staircase F. Go up staircase F and you're close to the motor room." *There are ladders on either side of the bulkhead [at the motor room] for workers to use to safely traverse the bulkhead and gain access to and from the roof* (Muhlbach EBT pp. 45-48, 55) (emphasis added).

Stanton, a Deerpath foreman on the date of the alleged accident, oversaw the entire

Deerpath workforce on that job (Stanton EBT, pp. 7, 11). Stanton testified that the subject window "was not the access that we installed for those work areas." (Stanton EBT at p. 14). Stanton stated that *ladders* and pipe scaffold were provided to the Deerpath workers to access to the roof work areas (Stanton EBT, p. 17-19) (emphasis added).

However, plaintiff testified that the ladder was broken. Therefore, an issue of fact exists as to whether the window was the sole means by which plaintiff could access the inside of the building from her work area, and whether the ladder leading from such window to the room through which plaintiff could reach the exit to proceed to the bathroom was available (*see Priestly v Montefiore Medical Center/Einstein Med. Ctr.*, 103 AD3d 493, 781 NYS2d 506 [1st Dept 2004] (The permanently affixed ladder from which plaintiff fell was the only means of gaining access to his elevated worksite and as such was a "device" within the meaning of Labor Law § 240(1)).

Thus, it cannot be said that plaintiff's use of the window was the sole proximate cause of her accident. While liability under Labor Law § 240(1) cannot be imposed where the injured worker knows that adequate safety devices are available at the job site but for no good reason fails to use them *(Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005] (where stairs previously available had been removed and ladders were available on job site, plaintiff's choice to use inverted bucket to climb up and then jump down from motor room was sole cause of his injury), an issue of fact exists as to whether the ladder allegedly provided was available to enable plaintiff access to and from her worksite. Therefore, dismissal of plaintiff's Labor Law § 240 (1) claim is denied.

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 Ross,* 81 NY2d at 501-502). In order to recover a claimant must allege and prove that the owner or contractor violated a rule or regulation of the Commissioner of the Department of Labor which sets forth a specific standard of conduct, as opposed to a general reiteration of the common law (*see Ross,* 81 NY2d at 502-504). The violation of a specific standard of conduct, once proven, 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,* 55 NY2d at 160).

As to plaintiff's Labor Law § 241(6) claim, Industrial Code § 23-1.7(f), entitled " Vertical passage," provides that "[s]tairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided " Plaintiff raised an issue as to whether the ladder allegedly provided to bridge the height differential between the floor in the motor room and the roof failed to provide access to an above- or below-roof working area within the meaning of the regulation. The record supports plaintiff's claim that her work activities required a means of access to another working level within the meaning of Industrial Code § 23-1.7(f).

Plaintiff's failure to allege 12 NYCRR 23-1.7(f) in her pleadings, Bill of Particulars, or during discovery, is not fatal to her Labor Law § 241(6) claim (*Noetzell v Park Avenue Hall Housing Development Fund Corp.*, 271 AD2d 231, 705 NYS2d 577 [1st Dept 2000]). In

DiPalma v Metropolitan Transp. Auth. (20 Misc 3d 1128, 872 NYS2d 690 [NY Sup 2008]) it was noted that "[a]t one time the First Department held that violations of the Industrial Code, raised for the first time in opposition to a motion for summary judgment is acceptable, provided that the allegations in plaintiff's pleadings evince a violation of the sections asserted." The *DiPalma* Court also cited to the First Department 2003 decision, *Reily v Newireen Assoc.* (303 AD2d 214, 218 [1st Dept 2003]), for the proposition that the violations of the Industrial Code which are not pled within plaintiff's bill of particulars should not be considered. Then, citing *Schiulaz v Arnell Construction Corp.* (261 AD2d 247, 690 NYS2d 226 [1st Dept 1999]), the *DiPalma* Court stated that "Industrial Code violations raised for the first time within reply papers cannot be considered and thus do not preclude summary judgment."

However, the Court in *DiPalma* proceeded to consider the applicability of certain Industrial Code regulations raised for the first time in reply to address whether defendants, as movants, met their burden of establishing entitlement to dismissal of plaintiffs' Labor Law §241(6) claim. The Court acknowledged that caselaw indicated that, "the prohibition [against considering arguments raised for the first time in reply] is meant to address cases where the reply papers seek to introduce new evidence to cure deficiencies in the moving papers" (*citing Lumbermens Mutual Casualty Co. v Morse Shoe Co.*, 218 AD2d 624 [1st Dept 1995] (rejecting defendant's reply which included two new documents to support a new assertion not previously made in initial motion]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept 1992] (rejecting defendant's reply containing a medical affidavit designed to cure the conclusory affidavit submitted with its initial motion); *Sanford v 27-29 W. 181st Street Assoc. Inc.*, 300 AD2d 250, 251 [1st Dept 2002] (affidavit submitted with movant's reply mandated consideration because it

was not meant to cure a deficiency in the initial motion; the law regarding reply papers excludes only those replies where the proponent of summary judgment seeks to "remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply")).

Here, the alleged Industrial Code violation was raised in plaintiff's in opposition to defendants' motion for dismissal, and was not raised to cure a deficiency in any initial motion. Also, it cannot be said that there was unfair surprise or prejudice as to plaintiffs' claim under section 12 NYCRR 23-1.7(f) because defendants were provided with a description of where the accident occurred and had sufficient information to investigate and ascertain the extent of its potential liability. Additionally, at her deposition, plaintiff testified that there were no doors and that the window was essentially her only access through which should could ultimately reach the bathroom located on the floor below. Notably, defendants did not challenge the applicability of this section to the facts herein. And, contrary to defendants' contention, issues of fact exist as to whether plaintiff was provided with a safe means of access to the worksite . Therefore, plaintiff's citation to section 12 NYCRR 23-1.7(f) is permissible to defeat defendants' motion for summary judgment under the circumstances (*Noetzell v Park Avenue Hall Housing Dev. Fund Corp.*, 271 AD2d 231, 705 NYS2d 577 [1st Dept 2000] (stating that plaintiff's belated identification of an Industrial Code regulation entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendant. Under the circumstances, the Supreme Court erred in dismissing the cause of action merely because plaintiff neglected to set forth the Code violation either in his complaint or bill of particulars

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the Compliant of the plaintiff is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 8, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD