[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 115066/2007

CHACHA, SEGUNDO F.

VS

METROPOLITAN MEUSEUM OF ART

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
OCT 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: OCT 12 2010

HON. JUDITH J. GISCHE J.S.C.

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 10**

SEGUNDO F. CHACHA,

Plaintiff,

-against-

METROPOLITAN MUSEUM OF ART and, CITY OF NEW YORK,

Defendants.

**DECISION/ORDER**
Index No.: 115066/07
Seq. No.: 001

**PRESENT:**
Hon. Judith J. Gische
J.S.C.



Recitation, as required by CPLR 2219(a), of the papers considered in the review of this (these) motion(s):

| Papers | Numbered |
|---|---|
| Pltf's n/m (3212) w/ HWD affirm, SC & WM affids, exhs | 1 |
| Def's x/m (3212, 3211) w/ TJC affirm, CJA affirm, exhs | 2, 3 |
| Pltf's reply w/ HWD affirm, exhs | 4 |

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action for personal injuries allegedly sustained by plaintiff, Segundo Chacha ("Chacha" or "plaintiff"). Defendants are the Metropolitan Museum of Art ("MET") and the City of New York ("City"), who are jointly represented. Plaintiff claims his injuries were proximately caused by defendants' negligence and violations of Labor Law §§ 240, 241(6) and 200.

Issue has been joined and plaintiff seeks partial summary judgment on his Labor Law §§ 240(1) and 241(6) claims. Defendants cross-move for summary judgment dismissing plaintiff's complaint in its entirety. This motion was timely brought after plaintiff filed his note of issue on October 13, 2009. Since the motions are timely, they

can and will be decided on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004).

**Arguments Presented**

On September 13, 2006, the date of the accident, Chacha was employed by Liberty Contracting ("Liberty") to perform demolition work. He was injured while working in "Service Building B" on a construction project located at 1000 Fifth Avenue, New York, New York (the "Premises"). The City is the owner of the Premises and the MET is a long-term lessee.

Chacha provided a bill of particulars and was deposed. During his examination before trial ("EBT"), Chacha testified, through an interpreter, that he began working at the Premises in August of 2006. Chacha testified that on the date of his accident, he was working for Liberty and that his supervisor/foreman was Salvador.

Chacha testified that at the time of his accident, Salvador asked him to remove sections of the ceiling. Chacha stated that he was using a ten-foot high "A" frame wooden ladder and was standing on the second rung from the top when the accident occurred. Chacha testified, "I told the foreman to give me a scaffold, but he didn't give it to me." Chacha stated that while standing on the ladder, he was using a crowbar with both hands to hit the ceiling and take down the sheet rock. Chacha stated that he was on the ladder for "some three, four minutes . . . [then] I removed a small piece of the ceiling and when I pulled everything fell . . . once it hit me, it broke the ladder and the broken ladder fell on top of me."

Taylor Miller ("Miller"), currently the associate building manager for exhibitions at

the MET was also deposed. Miller testified at his deposition that in his former position as a project manager, he would be "given demolition drawings and . . . find a contractor and hire them to under take the demolition. If there's wall construction that's required, according to the drawings, [he would] find the contractor to undertake the wall construction." Miller stated that he was not on the Premises when the work was being performed, he did have access to the work site, but he did not "supervise the contractor's relationship with their employees."

Plaintiff further supports his claims with the expert testimony of Dr. William Marletta, a safety consultant, and defendants have provided the expert testimony of Carl Abraham, a professional engineer.

Plaintiff contends that defendant violated various sections of the Industrial Code, thereby violating labor law § 241(6). Plaintiff further argues that defendants violated Labor Law §§ 240(1) and 200 and common law negligence.

Defendants argue that the Industrial Code regulations relied upon by plaintiff are inapplicable to the facts of this case, as alleged, because, *inter alia*, plaintiff caused the debris to fall from the ceiling and there was nothing wrong with the ladder in question. Defendants further allege that they were not negligent because they did not create nor have notice of the alleged dangerous condition. Defendants also argue that plaintiff's labor law § 240(1) claim should be dismissed because Chacha's accident resulted from a falling object, not from a defective ladder, and, therefore, his injuries did not result from a gravity-related accident.

**Applicable Law**

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, *supra* at 563-64 (1980). Only if this burden is met, will it then shift to the opposing party, who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See* Hindes v. Weisz, 303 A.D.2d 459 (2d Dept. 2003)

**Discussion**

**Labor Law § 241 (6)**

Labor Law § 241(6) imposes a non-delegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers. Comes v. New York State Electric & Gas Co., 82 N.Y.2d 876 (1993); Rizzuto v L.A. Wenger Contr. Co., 91 N.Y.2d 343, 348 (1998); Ross v. Curtis-Palmer Hydro-Elec. Co.,

81 N.Y.2d 494, 501-502 (1993). To properly state a claim under Labor Law § 241(6), the plaintiff must identify a specific and applicable Industrial Code provision that has been violated. Ross v. Curtis-Palmer Hydro-Elec. Co., *supra*. The question of whether the plaintiff has alleged a specific provision of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 30 A.D.2d 121 (1st Dept. 2002).

Plaintiff is relying on the following provisions of the Industrial Code in seeking liability under Labor Law § 241(6): 12 NYCRR §§ 23-1.8(c)(1) and 23-1.21(b),(e)[1]; 23-1.7(a); 23-1.5; 23-1.7(e)(2); 23-1.33(a)(3).[2] Defendants claim that each and every provision has no application, under the facts of this case.

12 NYCRR § 23-1.8(c)(1) provides:

> (c) Protective apparel.
>
> (1) Head protection. Every person required to work or pass within any area where there is a danger of being struck by falling objects or materials or where the hazard of head bumping exists shall be provided with and shall be required to wear an approved safety hat. Such safety hats shall be provided with liners during work in areas or at such times where the temperature is below 55 degrees Fahrenheit.

Plaintiff does not allege that his accident resulted from a lack of head protection. In fact, in his deposition he states, "I had on a helmet, goggles, mask, and gloves." The

---

[1] Misidentified in plaintiff's papers as "231.1(e)."

[2] Although plaintiff's complaint only has a cause of action for Industrial Code §§ 23-1.8(c)(1) and 23-1.21(b), the remaining Industrial Code sections, though not pled, have been addressed on the merits by defendants. Therefore, the court will address these claims on the merits, as well.

court, therefore, finds that § 23-1.8(c)(1) does not apply to the facts of this case.

12 NYCRR § 23-1.21 provides:

> (b) General requirements for ladders.
>
> (1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.
>
> (2) Opaque protective coatings prohibited. The use of an opaque protective coating on any ladder is prohibited.
>
> (3) Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:
>
> (i) If it has a broken member or part.
>
> (ii) If it has any insecure joints between members or parts.
>
> (iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.
>
> (iv) If it has any flaw or defect of material that may cause ladder failure.
>
> (e) Stepladders.
>
> . . .
>
> (2) Bracing. Such bracing as may be necessary for rigidity shall be provided for every stepladder. . .
>
> (3) Stepladder footing. 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.

Although defendants contend that 12 NYCRR § 23-1.21(b) does not apply to the

facts of this case because there was nothing wrong with the ladder in question, this proposition is not supported by any evidence. Defendants argue that when Chacha was asked at his EBT whether he felt the ladder "move or shake or wobble," and he responded "No. It was fine," this proves that there was nothing wrong with the ladder. However, Chacha testified that he fell from the ladder while demolishing the ceiling with a crowbar and when the material from the ceiling hit him, "it broke the ladder and the broken ladder fell on top of [him]." Chacha also testified that the front leg and the back leg of the ladder broke.

While there is no evidence that the ladder contained an opaque coating (§ 23-1.21[b][2]) or was not otherwise maintained in good condition as defined under § 23-1.21(b)(3)(i-iv), the court finds that the ladder was clearly not "capable of sustaining without breakage," as required under § 23-1.21(b)(1). 12 NYCRR § 23-1.21(b)(1) is, therefore, applicable and provides a basis for liability under Labor Law § 241(6). Santamaria v. 1125 Park Ave. Corp., 249 A.D.2d 16 (1st Dept. 1998).

§ 23-1.21(e)(2) is a general safety standard and does not set forth specific standards of conduct to qualify as a predicate for a Labor Law § 241(6) claim. Spenard v. Gregware General Contracting, 248 A.D.2d 868 (3d Dept.1998). Plaintiff cannot proceed under this provision.

§ 23-1.21(e)(3) is specific enough to support a Labor Law § 241(6) cause of action where there is evidence that the ladder moved before or after the accident and that any alleged failure to secure the ladder was a proximate cause of the accident. *See* Cunningham v. Alexander's King Plaza, LLC, 22 A.D.3d 703 (2d Dept. 2005); Enderlin v. Hebert Indus. Insulation, Inc., 224 A.D.2d 1020 (4th Dept. 1996). Here, it is

undisputed that the ladder was 10 feet, that it was not steadied by a person, and it was not secured by mechanical means. Accordingly, § 23-1.21(e)(3) is applicable to the facts of this case.

12 NYCRR § 23-1.7(a) provides:

> 23-1.7. Protection from General Hazards
>
> (a) Overhead hazards.
>
> (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot.
>
> (2) Where persons are lawfully frequenting areas exposed to falling material or objects but wherein employees are not required to work or pass, such exposed areas shall be provided with barricades, fencing or the equivalent in compliance with this Part (rule) to prevent inadvertent entry into such areas.

§ 23-1.7(a) proscribes standards for overhead protection for work areas normally exposed to falling material or objects. Generally, this section applies to areas where workers are "normally exposed to falling objects" and where overhead work is a primary focus on the work site. Amato v. State, 241 A.D.2d 400. Here, it is undisputed that Liberty was contracted by the MET to perform demolition work on the Premises for the purpose of replacing an exhibit by breaking down walls and removing sections of the ceiling. At the time of the incident, plaintiff was directly involved in performing overhead work and removing sections of a ceiling. The court, therefore, finds that plaintiff's claim

under § 23-1.7(a) is applicable and sufficiently specific to support a Labor Law § 241(6) cause of action. *See* Zervos v. City of New York, 8 A.D.3d 477 (2d Dept. 2004); O'Hare v. City of New York, 280 A.D.2d 458 (2d Dept. 2001).

§ 23-1.7(e)(2) requires that floors and work areas be kept free from materials and debris. This is inapplicable to the facts of this case, as there is no allegation that plaintiff tripped on debris.

§ 23-1.33(a)(3) provides protection for persons passing by construction, demolition or excavation operations. This provision does not apply to any city in the State of New York having a population of one million or more persons. Since New York City has a population of over 8 million people[3], § 23-1.33(a)(3) does not apply. Furthermore, plaintiff was not a passerby.

§ 23-1.5 sets forth the general responsibility of employers, including safety standards, health and safety protections, and general requirements of competency. This is a general section; it does not set forth specific requirements, and therefore, is not a predicate basis for a Labor Law § 241(6) claim. *See* Wilson v. Niagara University, 43 A.D.3d 1292 (4th Dept. 2007).

Plaintiff also claims that various OSHA regulations were violated. However, alleged violations of OSHA regulations are not predicates for a Labor Law § 241(6) claim. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350 (1998).

Based upon the foregoing, plaintiff's motion for summary judgment under Labor Law § 241(6) is denied as to Industrial Code §§ 23-1.8(c)(1); 23-1.21(b)(2), (b)(3),

---

[3] New York City had an estimated population of 8,214,426 people in 2006 according to the U.S. Census Bureau.

(e)(2); 23-1.5; 23-1.7(e)(2); and 23-1.33(a)(3), which are either too general or otherwise do not apply to plaintiff's accident; and defendants' motion for summary judgment is granted as to these industrial code provisions, which are hereby severed and dismissed. Plaintiff's motion is granted as to Industrial Code §§ 23-1.21(b)(1); 23.1.21(e)(3); and 23-1.7(a). Plaintiff has made a *prima facie* case that defendants violated these sections of the Industrial Code . Since defendants have not set forth any triable issues of fact [Alvarez, *supra*; Zuckerman, *supra*], plaintiff's motion for summary judgment is granted as to Industrial Code §§ 23-1.21(b)(1); 23.1.21(e)(3); and 23-1.7(a); and defendants' motion for summary judgment on these provisions is denied.

**Labor Law § 240 (1)**

Labor Law § 240(1), commonly known as the "scaffold law," was enacted to protect workers in construction projects against injury from the expected risks of inherently hazardous work posed by elevation differentials at the work site. Buckley v. Columbia Grammar and Preparatory, 44 A.D.3d 263, 267 (1st Dept 2007) *citing* Misseritti v. Mark IV Constr. Co., 86 N.Y.2d 487 (1995). The scaffold law places "absolute liability" upon owners, contractors, and their agents for any breach of the statutory duty which has proximately caused injury and, accordingly; it is only to be construed as liberally as necessary to accomplish the purpose for which it was framed. Panek v. County of Albany, 99 N.Y.2d 452 (2003).

The statute is not intended to protect construction workers from routine workplace risks, but from pronounced risks arising from construction worksite elevation

differentials. This means that there is no liability under this statute unless the accident is attributable to that kind of risk. Runner v. New York Stock Exchange, Inc., 13 N.Y.3d 599 (2009). Consequently, the statute's protections extend only to a narrow class of special hazards [Nieves v. Five Boro A.C. & Refrig. Corp., 93 N.Y.2d 914 [1999]) and not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1). Narducci v. Manhasset Bay Assoc., 96 N.Y.2d 259, 267 (2001).

In order to recover damages for violation of the statute, the "plaintiff must show more than simply that an object fell causing injury to a worker." Novak v. Del Savio, 64 A.D.3d 636 (2d Dept. 2009) *citing* Narducci, *supra*. The single decisive issue of whether plaintiff has a claim under Labor Law § 240(1) is whether his injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential. Runner, *supra*.

The claims made by defendants in their cross-motion do not raise triable issues of facts to defeat summary judgment on the issue of liability. Although defendants contend that this was a falling object case and not a wobbly ladder case, the court disagrees. Here, plaintiff has shown that he was instructed to do certain work at an elevation. He was provided with a ladder to do the work. The ladder was not secured in any way, and no one was holding the ladder for him. Where a ladder is the safety device offered to a worker to perform his job, the failure to properly secure the ladder, to ensure that it remains steady and erect while being used, establishes a *prima facie* violation of Labor Law § 240 because the risk that the ladder may fall is within the protections of the statute. Kijak v. 33 Madison Ave. Corp., 251 A.D.2d 152 (1st Dept. 1998); Wasilewsk v. Museum of Modern Art, 260 A.D.2d 27 (1st Dept. 1999). The

plaintiff does not have to prove that the ladder was defective, only that the defendants' failure to provide adequate safety devices to secure the ladder on which he was working was a proximate cause of the accident. Therefore, plaintiff has established a *prima facie* violation of Labor Law § 240(1) and his entitlement to summary judgment on the issue of liability, as a matter of law. Defendants' motion for summary judgment under Labor Law § 240(1) is, therefore, denied.

**Labor Law § 200**

Defendants cross-move for summary judgment on common law negligence and Labor Law § 200. Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto, *supra.* Unlike Labor Law § 241(6), liability can be imposed only if the defendant has actually been negligent. Since defendants have moved for summary judgment on this cause of action, defendants must prove it did not exercise supervision and control over injury producing work, or have actual or constructive notice of the dangerous condition alleged, or create the condition. Sheridan v. Beaver Tower Inc., 229 A.D.2d 302 (1st Dept. 1996) *lv den* 89 N.Y.2d 860 (1996); O'Sullivan v. IDI Construction Co., Inc., 28 A.D.3d 225 *aff'd* 7 N.Y.3d 805 (2006); Rizzuto, *supra*; Gonzalez v. United Parcel Serv., 249 A.D.2d 210 (1st Dept. 1998).

Where the alleged defect or dangerous condition arises from the [sub]contractor's methods, and the owner exercised no supervisory control over the operation, no liability will be imposed on the owner or general contractor under either

the common law or Labor Law § 200. Comes v. New York State Elec. & Gas Corp., 82 N.Y.2d 876 (1993); Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 505 (1993). Simply having a general right to supervise the work, or retaining contractual inspection privileges is insufficient to constitute supervisory control so as to impose liability on an owner or general contractor under Labor Law § 200 or a common law negligence claim. Hughes v. Tishman Construction Corp., 40 A.D.3d 305 (1st Dept. 2007); Brown v. New York City Economic Dev. Corp., 234 A.D.2d 33 (1st Dept. 1996); Gonzalez v. United Parcel Serv., *supra*.

Defendants have met the initial burden of showing that they did not control the manner in which the plaintiff performed his work, i.e. how the injury producing work was performed. Hughes v. Tishman Construction Corp., *supra* at 2. It is undisputed that plaintiff was supervised by his own employer, Liberty, and nobody else. Plaintiff's common law negligence and Labor Law § 200 claims are deemed abandoned as plaintiff does not address or oppose this portion of defendants' cross motion and plaintiff has not come forward to present factual disputes that have to be tried on this issue.

Therefore, defendant's motion for summary judgment, dismissing plaintiff's causes of action for Labor Law § 200 and common law negligence is granted and these causes of action are hereby severed and dismissed.

Defendants generally claim that plaintiff is "responsible" for causing his own injuries. Comparative negligence is not a defense to a statute imposing absolute liability (Labor Law § 240), but it is a defense to Labor Law § 241. Labor Law § 241(6) requires owners and general contractors "to provide reasonable and adequate protection and

safety to the persons employed therein . . ." In contrast to § 240(1), the culpable conduct of the injured person is relevant, and the comparative fault of the plaintiff should be considered. Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 512 (1991).

Liability under Labor Law § 240 can only be avoided if the worker was the sole proximate cause of the accident and there can be no liability under section 240(1) when there is no violation and the worker's actions (i.e.- his negligence) are the "sole proximate cause" of the accident. *See* Blake v. Neighborhood Housing Services of New York City, Inc., 1 N.Y.3d 280 (2003); Zong Mou Zou v. Hai Ming Const. Corp., 74 A.D.3d 800 (2d Dept. 2010). Here, defendants do not specifically ask for any relief regarding plaintiff's "fault" in their cross-motion, but defendants merely state, in a conclusory fashion, without offering admissible evidence, that plaintiff was at fault. Defendants offer no facts to support their conclusory allegations that plaintiff contributed to or was the sole proximate cause of his accident. There is also nothing in plaintiff's EBT that would suggest that plaintiff was the sole proximate cause of his accident. Consequently, there are no issues of fact precluding a finding of liability in favor of plaintiff on either his Labor Law § 240 or Labor Law § 241 claims and, therefore, there is no issue for the jury to decide on comparative negligence.

**Conclusion**

*It is hereby:*

**ORDERED** that plaintiff, Segundo F. Chacha's motion for partial summary judgment on it's Labor Law § 240(1) claim is granted; and it is further

**ORDERED** that plaintiff's motion for partial summary judgment on it's Labor Law § 241(6) claim is granted only as to Industrial Code §§ 23-1.21(b)(1); 23-1.21(e)(3); and 23-1.7(a). Plaintiff's motion is denied as to Industrial Code §§ 23-1.8(c)(1); 23-1.21(b)(2), (b)(3), (e)(2); 23-1.5; 23-1.7(e)(2) and 23-1.33(a)(3), which are hereby severed and dismissed; and it is further

**ORDERED** that defendants' cross-motion for summary judgment on plaintiff's Labor Law § 200 and common law negligence claims are granted, and these claims are hereby severed and dismissed; and it is further

**ORDERED** that defendants' cross-motion for summary judgment on plaintiff's Labor Law § 240(1) claim is denied; and it is further

**ORDERED** that defendants' cross-motion for summary judgment on plaintiff's Labor Law § 241(6) is granted in part and denied in part, as indicated in this order; and it is further

**ORDERED** that this case is ready for trial on the issue of damages only. The plaintiff is directed to immediately file a copy of this decision with Trial Assignment Part 40, so that the issue of damages may be tried; and it is further

**ORDERED** that any relief requested, but not expressly addressed has nonetheless been considered by the court and is hereby denied; and it is further

**ORDERED** that this shall constitute the decision and order of the court.

Dated: New York, New York
October 12, 2010



So Ordered:

**HON. JUDITH J. GISCHE, J.S.C.**