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SHORT FORM ORDER

INDEX No. 08-36206
CAL. No. 10-00557OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. PATRICK A. SWEENEY
Justice of the Supreme Court

MOTION DATE 8-26-10
ADJ. DATE 10-21-10
Mot. Seq. # 001 - MD

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FATMIR JAO,

Plaintiff,

- against -

TRITEC BUILDING COMPANY, INC. and 125 KENNEDY H, LLC,

Defendants.

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Answering Affidavits and supporting papers 14 - 18 ; Replying Affidavits and supporting papers 19 - 20 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability pursuant to Labor Law §§ 240 (1) and/or 241 (6) is denied.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and common-law negligence, for injuries he allegedly sustained in a fall from a ladder on July 18, 2008. The commercial property was owned by defendant 125 Kennedy H. LLC (125 Kennedy), which hired the subcontractors, including defendant Tritec Building Company, Inc. (Tritec) and the plaintiff's employer, nonparty Sal's United Services, Inc. (United), in conjunction with a renovation project.

According to the plaintiff's deposition testimony, he was directed by his foreman, Marvin Navaro, to install insulation on an inside wall and was given an six-foot aluminum A-frame ladder to perform his task. He stated that United had both six-foot and 10-foot ladders at the site and that, although he asked Navaro several times for a 10-foot ladder, he was told to make do with the six-foot ladder. He had been working a few hours installing the insulation, he had placed the ladder on level and

uncluttered flooring, and he had experienced no problem with the ladder. On his alleged last trip up the ladder, as he was working from the second step below the top cap, he felt the ladder shake and attempted to climb down the ladder. However, the ladder "flipped" and both he and the ladder fell. After his fall, the plaintiff noticed small pieces of electrical cable underneath the ladder. The gravamen of his arguments is that the ladder was too short for him to safely perform his work and the ladder was placed on debris which made it unstable. He testified that after his fall he did not continue to work but, rather, sat and waited for his girlfriend to pick him up at the end of the day.

Labor Law § 240 (1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether it had actually exercised any supervision or control over the work (***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]). Specifically, Labor Law § 240 (1) requires that safety devices, such as ladders, be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (*see*, ***Bland v Manocherian***, 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.***, 240 AD2d 392, 658 NYS2d 97 [1997]). An injured plaintiff's contributory negligence will not exonerate a defendant who has violated § 240 (1) (*see,* ***Raquet v Braun***, 90 NY2d 177, 184, 659 NYS2d 237 [1997]). Conversely, a defendant is not liable under § 240 (1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d 280, 290-291, 771 NYS2d 484 [2003]).

Where, as here, a ladder collapses, slips or otherwise fails to perform its function of safely supporting the worker, a statutory violation, and thus prima facie entitlement to summary judgment, has been established (***O'Connor v Enright Marble & Tile Corp.***, 22 AD3d 548, 802 NYS2d 506 [2005]; ***Morin v Machnick Bldrs.***, 4 AD3d 668, 669-670, 772 NYS2d 388 [2004]). "Once the plaintiff makes a prima facie showing, the burden then shifts to the defendant, who may defeat plaintiff's motion for summary judgment only if there is a plausible view of the evidence--enough to raise a fact question--that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident" (***Blake v Neighborhood Hous. Servs. of N.Y. City***, *supra* at 289; ***Squires v Robert Marini Bldrs.***, 293 AD2d 808, 809, 739 NYS2d 777, *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]).

The defendants' opposition relies upon the deposition testimony of Navaro and the plaintiff's coworker, Andrew Zeb. According to Navaro's testimony, all insulation above eight feet had already been installed using a mechanized lift and the plaintiff's task was to install insulation below that eight foot line. Therefore, the six-foot ladder was sufficient for the plaintiff's task. Moreover, the plaintiff never requested a taller ladder and, when Navaro went to the plaintiff directly after his fall, the plaintiff told him he was not hurt and continued to work the remainder of the day. Navaro also stated that he saw that the floor was littered with debris from the electricians. According to Zeb's testimony, earlier in the day he had seen the plaintiff standing on the end cap (the upper most part) of the ladder, a clear danger. Shortly prior to the plaintiff's fall, he saw him working from a 10-foot ladder and saw that the floor was littered with electrical debris. Although he did not witness the accident, he heard it and immediately went to the plaintiff. The plaintiff told him that he was not hurt and continued to work the rest of the

day.

It is well settled that on a motion for summary judgment, a court's function is to determine whether material factual issues exist, not to resolve such issues (*see*, ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, 165 NYS2d 498 [1957]; ***Baker v D.J. Stapleton, Inc.***, 43 AD3d 839, 841 NYS2d 382 [2007]). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (***Lopez v Beltre***, 59 AD3d 683, 873 NYS2d 726 [2009]; ***Scott v Long Is. Power Auth.***, 294 AD2d 348, 741 NYS2d 708 [2002]). Here, the defendants have raised issues of fact and credibility as to how the accident happened and whether the plaintiff was the sole cause of his accident. Accordingly, so much of the plaintiff's motion which seeks summary judgment as to his Labor Law § 240 (1) claim is denied.

Labor Law § 241 (6) imposes a "nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers" (***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 601 NYS2d 49 [1993]; ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]). To recover on a cause of action alleging a violation of Labor Law § 241 (6), a plaintiff must establish the violation of an Industrial Code provision which sets forth specific safety standards (***Ross v Curtis-Palmer Hydro-Elec. Co.***, *supra* at 503-505). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (***Rizzuto v L.A. Wenger Contr. Co.***, *supra* at 349).

The plaintiff also seeks summary judgment on the defendants alleged violation of the Industrial Code provision found at 12 NYCRR §§ 23-1.7 (e) and 23-1.21 (e). Section 23-1.7 (e) entitled, "Tripping and other hazards," provides:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.
>
> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Here, the plaintiff's testimony established that the accident did not occur in a passageway but in a working area. Therefore, the Court concludes that subsection (1) is not applicable. Further, even if the plaintiff can establish that his accident was caused by debris on the floor under the ladder in the work area (subsection 2), a reading of the subdivisions under section 1.7 makes it clear that the regulations are directed to tripping and other hazards encountered by "persons." The plaintiff did not trip or stumble (*cf.*, ***Sergio v Benjolo N.V.***, 168 AD2d 235, 562 NYS2d 476 [1990]). Therefore, these sections are inapplicable to the plaintiff's fall.

Section 23-1.21 (e) entitled "Stepladders," provides, in relevant part:

> (2) Bracing. Such bracing as may be necessary for rigidity shall be provided for every stepladder. When in use every stepladder shall be opened to its full position and the spreader shall be locked.
>
> (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.

Here, there is no allegation that the ladder failed because it was not sufficiently rigid or not fully opened or locked. Therefore, subsection (2) is inapplicable. As to subsection (3), there is a question of fact regarding placement of the ladder footings on debris, and the issue of whether or not the work was being performed 10 feet or more from the footings, which would trigger the requirement of subsection (3) that the ladder have a person stationed at the foot, is also in dispute (*see generally*, ***Misicki v Caradonna***, 12 NY3d 511, 515, 882 NYS2d 375 [2009]; ***Riffo-Velozo v Village of Scarsdale***, 68 AD3d 839, 891 NYS2d 416 [2009]). However, while this subsection is arguably applicable, the Court of Appeals has held that a violation of the Industrial Code is not conclusive on the question of negligence, and that such violation would constitute only some evidence of negligence. Therefore, even if this subsection is applicable, resolution of the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances would be for the jury to resolve (***Elliot v City of New York***, 95 NY2d 730, 724 NYS2d 397 [2001]; ***Rizzuto v L. A. Wenger Contr. Co.***, *supra*).

Accordingly, the motion for summary judgment is denied.

Dated: 11-29-10

Paul A. Sweeny
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION