| **Springer v CPS 1 Realty, LP** |
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| 2011 NY Slip Op 30112(U) |
| January 18, 2011 |
| Sup Ct, NY County |
| Docket Number: 103499/07 |
| Judge: Martin Shulman |
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SCANNED ON 1/20/2011

[* 1]

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

PRESENT: MARTIN SHULMAN J.S.C.

PART 1

Index Number : 103499/2007

SPRINGER, ED

vs

CPS 1 REALTY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 103499/07

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 A-E | 1 |
| Answering Affidavits — Exhibits A | 2 |
| Replying Affidavits | 3 |
| Notice of Cross-Motion - Affidavits - exhibits A-J | 4 |
| Answering Affs. Replying Affs.- Exhibits | 5,6 |

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JAN 20 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: January 18, 2011

MARTIN SHULMAN J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

------------------------------------------------------------------X

ED SPRINGER and PAMELA SPRINGER,

Plaintiffs,

-against-

CPS 1 REALTY, LP AND TISHMAN CONSTRUCTION CORP. OF NEW YORK,

Defendants.

------------------------------------------------------------------X

Index No.:103499/07

**DECISION AND ORDER**

FILED

JAN 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MARTIN SHULMAN, J.S.C.:**

In an action involving a slip on a ladder, defendants CPS 1 Realty, LP (CPS) and Tishman Construction Corp. of New York (Tishman) move jointly, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff cross-moves for partial summary judgment against CPS and Tishman on the issue of liability under Labor Law § 240 (1), as well as on the issue of liability under Labor Law § 241 (6).

**BACKGROUND**

On November 27, 2006, plaintiff, engaged as a glazier on a renovation project at the Plaza Hotel in Manhattan, was tasked with installing rubber gaskets on window frames for a sloping roof on the 19th floor. In order to perform the work, plaintiff's supervisor directed him to use an eight-foot A-frame ladder, made of fiberglass, which was leaning against an elevator bank on the 19th floor (Plaintiff's Deposition, at 66-69).

Before his accident, plaintiff used the ladder approximately 15 times, moving it short distances, and ascending it as he inserted the rubber gaskets into a slight channel in the window frames along the sloping roof (*id.* at 66, 93). Each time he repositioned

the ladder, plaintiff swept the floor with his foot to clear demolition debris, which included black dust, wood chips and screws (*id.* at 88).

The portion of the window frame plaintiff was working on at the time of his accident was approximately 11 feet from the floor (Plaintiff's Deposition, at 99). After working on that section for about a minute, the ladder became unstable, both the ladder's legs on the right side lifted off the ground, and the ladder twisted (*id.* at 101-102). Both of plaintiff's feet slipped from the fifth rung of the ladder to the fourth, but he was able to bring the legs of the ladder back down onto the ground by grabbing the window frame with his left hand, and the ladder with his right hand, a process which twisted his back (*id.* at 103-106). Plaintiff took his hand from the window frame and placed it on the ladder as he descended the ladder, which shifted again before plaintiff made it to the ground (*id.* at 107).

When he examined the ladder after the accident, plaintiff observed a two-to-three-inch crack on the bottom of its front right leg (*id.* at 111-112). After observing the crack, plaintiff threw the ladder on a debris pile located along the north wall of the 19th floor (*id.* at 117).

Plaintiff claims that the accident resulted in a debilitating lower-back condition for which he underwent a largely unsuccessful three-level laminectomy and four-level spinal-fusion surgery (*id.* at 175-176, 181-208). Plaintiff alleges that CPS and Tishman, the owner of the Plaza Hotel and the construction manager, respectively, violated Labor Law §§ 200, 240 (1), and 241 (6).

**DISCUSSION**

CPS and Tishman argue that the plaintiff's cross motion must be denied because it is untimely. The court disregards this argument, as the plaintiff's untimely cross motion addresses the Labor Law causes of action that are the subject of defendants' timely motion (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 71 AD3d 538, 540 [1st Dept 2010]).

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324 [emphasis in original]).

**Labor Law § 200 and Common-Law Negligence**

CPS and Tishman move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claim. Labor Law § 200 "codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). As the section tracks common-law negligence principles, "a party charged with liability must be shown to have notice, actual or constructive, of the unsafe condition and to have exercised sufficient control over the work being performed to correct or

avoid the unsafe condition" (*Leon v J&M Peppe Realty Corp.*, 190 AD2d 400, 410 [1st Dept 1993]).

CPS and Tishman argue that plaintiff's Labor Law § 200 claim must be dismissed as the defendants had no actual or constructive knowledge of any defective condition on the ladder which plaintiff was using on the day of his accident. CPS and Tishman submit plaintiff's deposition, in which plaintiff testified that immediately before using the ladder, he looked it over and, while it seemed used, "it appeared safe for the job [he] was going to be doing" (Plaintiff's Deposition, at 77). CPS and Tishman also submit the deposition of Dominic Ricci (Ricci), Tishman's superintendent on the renovation project. Ricci testified that he intermittently checked the ladders for defects and never observed any cracks in fiberglass ladders while on the renovation project (Ricci Deposition, at 49-51, 55).

CPS and Tishman also argue that plaintiff's Labor Law § 200 claim must be dismissed as it is clear that the defendants did not control plaintiff's work. CPS and Tishman refer to plaintiff's deposition, in which plaintiff indicated that he was given instructions by David Rodriguez, a representative of non-party Basec Corp., plaintiff's employer on the day of the accident (Plaintiff's Deposition, at 51, 55-56).

Plaintiff does not respond to defendants' notice argument. Instead, plaintiff argues that there is an issue of fact as to whether defendants' failure to supervise its trade contractors regarding proper ladder use and safety to ensure compliance with their own safety regulations constituted a violation of Labor Law § 200. Plaintiff refers to the deposition of Ricci, Tishman's superintendent, who testified that Tishman

contracted with a site-safety officer who supervised safety issues on the worksite (Ricci Deposition, 45-48).

Here, CPS and Tishman make a prima facie showing of entitlement to judgment as a matter of law on the issue of liability under Labor Law § 200 by submitting evidence that they did not have notice of any defective condition of the ladder which plaintiff was using at the time of his accident. Plaintiff testified that he inspected the ladder before using it, and did not notice any defects. This shows that the defect which plaintiff observed in the ladder after his fall, a crack in one of the front legs, did not exist or was not readily apparent before he began using the ladder. Thus, there was no opportunity for defendants to discover the defect and remedy it. In not addressing CPS and Tishman's notice argument, plaintiff fails to rebut defendants' prima facie showing. As such, plaintiff's Labor Law § 200 and common-law negligence claim must be dismissed.

**Labor Law § 240 (1)**

CPS and Tishman move for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, while plaintiff cross-moves for partial summary judgment on the issue of defendants' liability under this section. Labor Law § 240 (1), entitled "Scaffolding and other devices for use of employees," 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.

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The Court of Appeals has held that this duty to provide safety devices is nondelegable (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 559 [1993]), and that absolute liability is imposed where a breach has proximately caused plaintiff's injury (*Bland v Manocherian*, 66 NY2d 452, 459 [1985]). While "[n]ot every worker who falls at a construction site ... gives rise to the extraordinary protections of Labor Law § 240 (1)" (*Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 288 [2003] [internal quotation marks and citation omitted]), the statute "is to be liberally construed" to accomplish its purpose of better protecting "workers engaged in certain dangerous employments" (*Sherman v Babylon Recycling Ctr., Inc.*, 218 AD2d 631, 631 [1st Dept] [internal quotation marks and citation omitted]), *lv dism* 87 NY2d 895 (1995).

As to whether a worker was subject to a gravity-related hazard contemplated by the statue, the Court of Appeals recently distilled this inquiry to the "single decisive question" of "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). The First Department has held that a worker's accident was gravity-related even where the worker slipped, almost fell off a roof, but managed to regain his balance while spilling hot tar on his feet (*Suwareh v State*, 24 AD3d 380 [1st Dept 2005]).

With respect to falls from A-frame ladders, the First Department has held that Labor Law § 240 (1) is violated when a plaintiff, while engaged in a protected activity and subject to an elevation risk, is injured as a result of falling from an unsecured ladder which failed to support him safely (*Bonanno v Port Auth. of N.Y. & N.J.*, 298

AD2d 269, 270 [1st Dept 2002]). In these circumstances, it is "sufficient to show the absence of adequate safety devices to prevent the ladder from sliding or to protect plaintiff from falling," and the plaintiff is "under no obligation to show that the ladder was defective in some manner" (*id.*; *see also Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 174 [1st Dept 2004] [holding that "(w)here a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection" and "(i)t is well settled that (the) failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240 (1)"] [internal quotation marks and citation omitted]). Moreover, "[g]iven an unsecured ladder and no other safety devices, plaintiff cannot be held solely to blame for his injuries" (*Velasco v Green-Wood Cemetery*, 8 AD3d 88, 89 [1st Dept 2004]).

CPS and Tishman argue that plaintiff's Labor Law § 240 (1) claim should be dismissed, as plaintiff was not subject to an elevation risk as contemplated by the statute since he only fell from the fifth rung to the fourth rung of the ladder. Moreover, CPS and Tishman argue that there was no statutory violation which proximately caused plaintiff's injuries. Finally, CPS and Tishman argue that plaintiff's Labor Law § 240 (1) claim should be dismissed, as plaintiff intentionally destroyed the ladder, a key piece of evidence, by throwing it on a debris pile after he observed a crack in one of its legs.

With respect to defendants' spoliation argument, plaintiff argues that he did not know the full extent of his injuries following his accident and simply followed protocol by disposing of a defective ladder, not foreseeing that he would bring a legal action based on the incident. Further, plaintiff contends that the ladder is not key evidence, as he is

entitled to recover under Labor Law § 240 (1) regardless of whether the ladder was defective, since the ladder was not secured and failed to provide him proper protection.

Plaintiff argues that he is entitled to partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1), as defendants, the statutory owner and contractor, respectively, violated the statute by failing to provide him with a ladder that remained steady, stable and erect while he used it for overhead work. By causing him to fall from one rung to the next, this violation, plaintiff contends, proximately caused a serious lower back injury.

Preliminarily, the court rejects defendants' application for a spoliation sanction dismissing plaintiff's Labor Law § 240 (1) claim, as there is no evidence that plaintiff disposed of the subject ladder either intentionally or negligently with knowledge of its potential evidentiary value (*see Boyle v City of New York*, --AD3d--, 2010 WL 5293563, *1 [1st Dept 2010]).

Next, it is clear that plaintiff faced a risk arising from a physically significant elevation differential. The fact that plaintiff only slipped from the ladder's fifth rung to the fourth, instead of 11 feet, all the way to the ground, does not change the fact that plaintiff's lower back was injured as a direct consequence of defendants' failure to secure the ladder. Just as there was no break in proximate causation in *Suwareh*, where the worker's slip resulted in his spilling hot tar on his feet, instead of falling off the roof, there is no break in proximate causation here because plaintiff failed to fall all the way to the ground. As such, plaintiff's cross motion for partial summary judgment on the issue of defendants' liability pursuant to Labor Law § 240 (1) must be granted.

Consequently, the branch of defendants' motion seeking dismissal of plaintiff's claim under this section must be denied.

**Labor Law § 241 (6)**

CPS and Tishman move for summary judgment dismissing plaintiff's Labor Law § 241 (6) claims, while plaintiff cross-moves for partial summary judgment on the issue of defendants' liability under this section. Labor Law § 241 (6) provides, in pertinent part, that:

> All areas in which construction ... work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The duty imposed on owners and contractors by this section is nondelegable and it exists even in the absence of control or supervision of the worksite (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348-349 [1998]).

In order to support a claim under Labor Law § 241 (6), plaintiff must allege a violation of an Industrial Code regulation which "mandate[s] compliance with concrete specifications and [does] not simply declare general safety standards or reiterate common-law principles" (*Misicki v Caradonna*, 12 NY3d 511, 515 [2009] [internal citation omitted]). The violation of the regulation must also be the proximate cause of the plaintiff's injury (*Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 271 [1st Dept 2007]), *lv den* 10 NY3d 710 [2008].

Moreover, contributory and comparative negligence are valid defenses to claims brought under this section, unlike claims brought pursuant to Labor Law § 240 (1) (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 [1993]). Also, unlike Labor Law §

240 (1), where absolute liability follows a breach, a violation of a regulation is merely some evidence of negligence in the Labor Law § 241 (6) context (*id.*).

Plaintiff argues that defendants violated either 12 NYCRR 23-1.21 (b) (3) (i), which provides that a ladder may not be used if it is broken, 12 NYCRR 23-1.21 (b) (3) (iv), which prohibits the use of ladders with a flaw or defect, or 12 NYCRR 23-1.21 (b) (1), which provides that 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." These regulations have been held to be sufficiently specific to support a cause of action under Labor Law § 241 (6) (*Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2d Dept 2008]; *De Oliveira v Little John's Moving, Inc.*, 289 AD2d 108, 109 [1st Dept 2001]).

As to 12 NYCRR 23-1.21 (b) (3) (i) and 12 NYCRR 23-1.21 (b) (3) (iv), CPS and Tishman argue that plaintiff testified that he inspected the ladder before using it and did not discover any cracks or defects. 12 NYCRR 23-1.21 (b) (1) is inapplicable, CPS and Tishman contend, as there is no evidence as to the ladder's maximum load.

Plaintiff argues that the crack he found in the ladder's front-right leg shows that either the ladder was cracked before he used it, a violation of 12 NYCRR 23-1.21 (b) (3) (i), or that it was defective, a violation of 12 NYCRR 23-1.21 (b) (3) (iv), or that it could not sustain at least four times the maximum load intended to be placed on it, a violation of 12 NYCRR 23-1.21 (b) (1).

Neither defendants nor plaintiff makes a prima facie showing of entitlement to judgment with respect to liability under Labor Law § 241 (6). That plaintiff examined the ladder before using it without finding any cracks does not conclusively show that there

were no cracks or defects in the ladder. Conversely, that plaintiff noticed a crack in the ladder's leg after his accident does not conclusively show that there was a crack or defect in the ladder before his accident.

While plaintiff's testimony about the accident and the state of the ladder afterwards may show that the ladder was not capable of sustaining at least four times the maximum load intended to be placed on it without breakage, and thus a violation of 12 NYCRR 23-1.21 (b) (1), plaintiff has made no showing that this violation was the proximate cause of his injuries. The evidence presented makes it equally likely that the crack in the ladder's leg was a result, rather than a cause, of plaintiff's accident. That is, the leg could have broken after the right legs of the ladder came off the floor and after plaintiff wrenched his back. As neither defendants nor plaintiff makes a prima facie showing, the applications of both parties for summary judgment as to liability under Labor Law § 241 (6) must be denied.

Based on the foregoing, it is

ORDERED that the branch of defendants CPS 1 Realty, LP and Tishman Construction Corp. of New York's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted; and it is further

ORDERED that the branch of defendants CPS 1 Realty, LP and Tishman Construction Corp. of New York's motion which seeks summary judgment dismissing plaintiff's claim pursuant to Labor Law § 240 (1) is denied; and it is further

ORDERED that the branch of plaintiff's cross motion which seeks partial summary judgment on the issue of defendants' liability under Labor Law § 240 (1) is granted, with the amount of damages to be determined at trial; and it is further

ORDERED that the branch of defendants CPS 1 Realty, LP and Tishman Construction Corp. of New York's motion which seeks summary judgment dismissing plaintiff's claims pursuant to Labor Law § 241 (6) is denied; and it is further

ORDERED that the branch of plaintiff's cross motion which seeks partial summary judgment on the issue of defendant's liability under Labor Law § 241 (6) is denied.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: New York, New York
January 18, 2011

Martin Shulman, J.S.C.

FILED

JAN 20 2011

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