

Khan v 1765 First Assoc. LLC
2011 NY Slip Op 30919(U)
April 4, 2011
Supreme Court, New York County
Docket Number: 106136/2009
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 106136/2009

KHAN, RUSTUM

vs
1765 FIRST ASSOCIATES

Sequence Number : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

and cross motion

Upon the foregoing papers, it is ordered that this motion

are decided for

attached

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

FILED

APR 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/4/11

EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

FILED

APR 13 2011

-----X
RUSTUM KHAN,

Plaintiff,

NEW YORK
COUNTY CLERK'S OFFICE

-against-

Index No. 106136/09

1765 FIRST ASSOCIATES LLC and LEON D.
MATTEIS CONSTRUCTION CORPORATION,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

This is an action arising out of a workplace accident which occurred on April 9, 2009 at 1765 First Avenue in Manhattan. Plaintiff, Rustum Khan, a carpenter, alleges that he was injured when he fell from an unsecured ladder. Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability under Labor Law § 240 (1) against defendants 1765 First Associates LLC (1765 First Associates) and Leon D. DeMatteis Construction Corporation (DeMatteis) (seq. no. 001). Defendants cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.

BACKGROUND

At the time of the accident, the subject building was owned by 1765 First Associates. 1765 First Associates hired DeMatteis as a general contractor to perform certain construction work within the building. Plaintiff was an employee of non-party Prince Carpentry, Inc. (Prince), a subcontractor.

Plaintiff testified at his deposition that, on April 9, 2009, he was working on a construction job at 91st Street and First Avenue (Plaintiff EBT, at 16). Plaintiff was working for Prince (*id.*). He had been working on the project for about three or four months (*id.* at 16-17).

According to plaintiff, he was “shooting track” in the ceiling in order to frame the walls (*id.* at 16-17, 28). Plaintiff stated that “[i]t’s laid out on the floor, so you would measure on the floor, cut your track. Then you would have your track in one hand, the gun in the other hand. And you would go up your ladder, take your balance on the ladder, and then you would reach up and shoot the track” (*id.* at 37). Plaintiff’s supervisor was John Ree (*id.* at 21). Plaintiff testified that Prince provided his tools and equipment, including ladders (*id.* at 24-25). The ladder that Prince provided to plaintiff was a four-foot wooden ladder (*id.* at 26).

On the date of the accident, plaintiff was shooting track on either the 25th or 26th floor of the building (*id.* at 29). Plaintiff testified that he “open[ed] the ladder, put it in [the] position that [he] need[ed] to go up to shoot the track” (*id.* at 34). Plaintiff did not notice that anything was wrong with the ladder (*id.* at 35, 42). When asked whether he looked at the ladder or checked the footing of the ladder, plaintiff stated that “[i]t was okay” (*id.* at 35). The ladder did not have any rubber footings (*id.*). Plaintiff stated that the ceiling was about 9 or 10 feet high (*id.* at 36). After setting up the ladder in the morning, plaintiff moved the ladder to other locations in order to perform his work (*id.* at 40). As plaintiff went up the ladder, he had the track in one hand and a gun in the other (*id.* at 37, 44). Plaintiff stated that “as [he] reach[ed] up there and [he] took [his] balance, reaching up to shoot the track, the ladder fell to the right, and [he] fell to the left” to the concrete floor (*id.* at 44-45, 46). Plaintiff believed that he was standing on the third step of the ladder when he fell (*id.* at 46). When plaintiff screamed, his co-worker came over to him (*id.* at 49). After the accident, plaintiff was in the hospital for one month, and underwent three surgeries (*id.* at 62). Plaintiff did not learn that there was anything wrong with the ladder (*id.* at 115). Plaintiff testified that he did not lose his balance (*id.* at 116).

Anthony Corrado testified that he is employed as a project superintendent by DeMatteis (Corrado EBT, at 8-9). Corrado stated that he was assigned to the 333 East 91st Street project (*id.* at 9). DeMatteis is a general contractor (*id.* at 11). 1765 First Avenue was the owner of the premises (*id.* at 16). According to Corrado, he coordinated daily work activities, and was responsible for safety (*id.* at 17). Prince performed rough and finished carpentry work on the job site (*id.* at 21). Corrado testified that he maintained daily logs of the work performed (*id.* at 24). Prince provided its own ladders (*id.* at 27). On the date of the accident, Corrado received a telephone call indicating that plaintiff was involved in an accident (*id.* at 28). Corrado observed plaintiff on the floor with his tool belt on, a ladder off to the side, and people surrounding him, trying to keep him calm (*id.* at 30). Corrado did not speak to plaintiff about how the accident occurred (*id.* at 34). Prince had four-foot, six-foot, eight-foot, and ten-foot ladders on the project (*id.* at 37-38).

Plaintiff commenced this action on May 1, 2009, asserting causes of action for common-law negligence and violations of Labor Law §§ 200, 240, and 241 (6). In his verified bill of particulars, plaintiff alleges violations of Labor Law §§ 200, 240 (1), 240 (3), and 241 (6) (Verified Bill of Particulars, ¶ 3). However, in opposition to defendants' cross motion, plaintiff withdrew his Labor Law § 240 (3) cause of action (Nonnenmacher Affirm. in Opposition, ¶ 4).

DISCUSSION

It is well established that 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” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851, 853 [1985]). Once the proponent of the motion has made a prima facie showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court’s function on a motion for summary judgment is only to determine whether any triable issues of fact exist, not to determine the merits of any such issues (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003]).

Labor Law § 240 (1)

Plaintiff moves for summary judgment on the issue of liability under Labor Law § 240 (1) against 1765 First Associates, the owner, and DeMatteis, the general contractor on the job. Plaintiff contends that he is entitled to judgment because defendants failed to provide him with an adequately-secured ladder.

In opposing plaintiff’s motion, and in support of their own cross motion, defendants contend that plaintiff was the sole proximate cause of his injuries. As argued by defendants, there is no evidence that the subject ladder was inadequate or defective, or that any violation of the statute was a proximate cause of plaintiff’s injuries.

In reply, plaintiff urges the court to ignore defendants’ affirmation submitted in opposition because it is not supported by an affidavit from an individual with personal knowledge of the facts.

Contrary to plaintiff’s contention, defendants’ opposition is not procedurally defective. Although defendants did not submit an affidavit from an individual with personal knowledge of the facts, the affirmation from defendants’ counsel may properly “serve as the vehicle for the

[* 6]
submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e.g., documents, transcripts" (*Zuckerman*, 49 NY2d at 563; *see also Adam v Cutner & Rathkopf*, 238 AD2d 234, 240 [1st Dept 1997]).

Labor Law § 240 (1) provides, in pertinent part, that:

"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*" (emphasis added).

Labor Law § 240 (1) imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty which proximately causes an injury (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). The duty imposed is "nondelegable and . . . an owner or contractor who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). The purpose of the statute is to "protect[] workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520, *rearg denied* 65 NY2d 1054 [1985] [internal quotation marks and citations omitted]). Section 240 (1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed" (*Panek v County of Albany*, 99 NY2d 452, 457 [2003] [internal quotation marks and citation omitted]; *see also Cherry v Time Warner, Inc.*, 66 AD3d 233, 235-

236 [1st Dept 2009]).

To recover under Labor Law § 240 (1), the plaintiff must establish: (1) a violation of the statute (i.e., that the owner or contractor failed to provide adequate safety devices); and (2) that the statutory violation was a proximate cause of the injuries sustained (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). Proximate cause is established where a “defendant’s act or failure to act as the statute requires was a substantial cause of the events which produced the injury” (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 561-562 [1993] [internal quotation marks and citation omitted]). However, where the plaintiff’s actions are the sole proximate cause of the injuries, liability does not attach under the statute (*see Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875 [1998]; *see also Robinson*, 6 NY3d at 554).

The statute requires that ladders and other safety devices be “so constructed, placed and operated as to give proper protection” to construction workers (Labor Law § 240 [1]; *see also Klein v City of New York*, 89 NY2d 833, 834-835 [1996]). “In cases involving ladders or scaffolds that collapse or malfunction for no apparent reason,” there is a presumption that the ladder or scaffolding device was “not good enough to afford proper protection” (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]). “It is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent” (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 252-253 [1st Dept 2008], quoting *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). The plaintiff is not required to show that the ladder was somehow defective (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 333-334 [1st Dept 2008]).

The court finds that plaintiff has made a prima facie case for recovery under the statute. Plaintiff testified that “as [he] reach[ed] up there and [he] [took] [his] balance, reaching up to shoot the track, the ladder fell to the right, and [he] fell to the left” (Plaintiff EBT, at 44-45). Plaintiff also testified that it was “just [him] there” (*id.* at 49). Thus, plaintiff has shown that the ladder was not an adequate safety device, and that he was not given any other safety devices to prevent him from falling (*see Picano v Rockefeller Ctr. N., Inc.*, 68 AD3d 425 [1st Dept 2009] [owner failed to provide adequate safety devices to plaintiff, where there was no dispute that no one was holding the ladder, and that no safety devices were provided to prevent the ladder from slipping or the worker from falling if it did]; *Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675 [1st Dept 2009] [(p)laintiff made a prima facie showing of liability under section 240 (1) by his testimony that the ladder tipped, causing him and the ladder to fall”]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1st Dept 1999] [plaintiff’s fall from 8- to 10-foot A-frame ladder, which was not secured to something stable or chocked or wedged in place, established violation of statute, where no other safety devices were provided]).

The burden thus shifts to defendants to raise an issue of fact as to whether plaintiff is entitled to prevail on liability on his Labor Law § 240 (1) claim (*see Zuckerman*, 57 NY2d at 562).

“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*, 1 NY3d at 289 n 8). To defeat summary judgment on this basis, the defendant must establish that plaintiff “had adequate safety devices available; that he knew both that they were

available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured” (*Auriemma v Biltmore Theatre, LLC*, – AD3d –, 2011 NY Slip Op 00439, *7 [1st Dept 2011], quoting *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Defendants have failed to raise an issue of fact. Although defendants argue that plaintiff was the sole proximate cause of his injuries, they have not pointed to any evidence in the record to show that adequate ladders or other safety devices were available, that plaintiff knew that they were available and that he was expected to use them, or that he chose not to use them for no good reason (*see Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010] [defendants failed to raise an issue of fact as to whether plaintiff knew of the availability of safety devices and unreasonably chose not to use them]; *Touunkara v Fernicola*, 80 AD3d 470, 471 [1st Dept 2011] [even if worker knew that safety devices were readily available, there was no evidence that the worker knew that he was expected to use them for the assigned task]; *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 548 [1st Dept 2010] [plaintiff was not the sole proximate cause of his accident where there was no evidence that plaintiff misused an adequate ladder or failed to use a readily available device that would have protected him from a fall]). Even if plaintiff was negligent in placing the ladder on the floor, the “[n]egligence, if any, of the injured worker is of no consequence” (*Rocovich*, 78 NY2d at 513). Moreover, contrary to defendants’ contention, plaintiff is not required to prove that the ladder was somehow defective (*see Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478, 479 [1st Dept 2010]; *Orellano*, 292 AD2d at 290-291).

Accordingly, plaintiff’s motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) is granted against defendants 1765 First Associates, the owner, and

DeMatteis, the general contractor. The issue of plaintiff's damages shall await the trial in this matter. The part of defendants' cross motion seeking dismissal of plaintiff's Labor Law § 240 (1) claim is denied.

Labor Law § 241 (6)

In moving for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action, defendants contend that plaintiff does not allege any violations of the Industrial Code in his complaint or bill of particulars.

In opposition to this branch of defendants' motion, plaintiff submits a supplemental bill of particulars, in which he asserts violations of 12 NYCRR 23-1.21 (a), (b) (1), (b) (3), (b) (4) (ii), (e) (2) and (e) (3), and OSHA section 1926.1053.

Defendants argue, in their reply, that plaintiff has failed to allege a concrete violation of the Industrial Code that proximately caused his accident.

Labor Law § 241 (6) requires owners, contractors, and their agents to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work. This statute is a "hybrid" provision "since it reiterates the general common-law standard of care and then contemplates the establishment of specific detailed rules through the Labor Commissioner's rule-making authority" (*Ross*, 81 NY2d at 503). To recover under Labor Law § 241 (6), a plaintiff must plead and prove the violation of a concrete specification of the New York State Industrial Code, containing "specific, positive command[s]," rather than a provision reiterating common-law safety standards (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 349 [1998] [internal quotation marks and citation omitted]).

In addition to establishing the violation of a specific and applicable regulation, the plaintiff must also show that the violation was a proximate cause of the accident (*Osorio v Kenart Realty, Inc.*, 35 AD3d 561, 563 [2d Dept 2006]). Comparative negligence is a defense to liability under section 241 (6) (*Spages v Gary Null Assoc., Inc.*, 14 AD3d 425, 426 [1st Dept 2005]).

As noted by the Court in *Kelleir v Supreme Industrial Park, LLC* (293 AD2d 513, 513-514 [2d Dept 2002]),

“[a]lthough a plaintiff asserting a Labor Law § 241 (6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code, a failure to identify the Code provision in the complaint or bill of particulars is not fatal to such a claim. Thus, the plaintiffs’ belated allegation of a violation of 12 NYCRR 23-1.8 (a) involved no new factual allegations, raised no new theories of liability, and caused no prejudice to the defendants. The plaintiffs’ failure to seek leave of court to supplement their bill of particulars is not fatal to their Labor Law § 241 (6) claim”

(citations omitted; *see also Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000] [plaintiff’s service of a supplemental bill of particulars without leave of court was proper since the allegations of the Industrial Code violations merely amplified and elaborated upon the facts and theories set forth in the complaint and bill of particulars]; *Walker v Metro-N. Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004] [a plaintiff’s failure to identify a specific provision in the complaint or bill of particulars is not necessarily fatal to a section 241 (6) claim and may be rectified by amendment in the absence of prejudice or surprise]).

While plaintiff did not identify any violations of the Industrial Code in the complaint or bill of particulars, the court shall consider the alleged violations of 12 NYCRR 23-1.21 because they involve no new factual allegations or theories of liability and do not prejudice defendants. However, plaintiff’s reliance on OSHA regulations is misplaced. An OSHA violation cannot serve as a predicate for a section 241 (6) claim here as defendants were not plaintiff’s employer

(see *Khan v Bangla Motor & Body Shop, Inc.*, 27 AD3d 526, 529 [2d Dept], *lv dismissed* 7 NY3d 864 [2006] [OSHA regulations govern employer/employee relationships]).

Section 23-1.21, entitled "Ladders and Ladderways," provides as follows:

"(a) Approval required. Any metal or fiberglass ladder which is 10 feet or more in length shall be approved. Any other ladder not named or described in this Part (rule) shall not be used unless approved.

(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.

(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.

(4) Installation and use.

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

(e) Stepladders.

- (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”

(12 NYCRR 23-1.21).

Initially, the court notes that section 23-1.21 (e) (2) is a general safety standard which does not qualify as a predicate for liability under section 241 (6) (*see Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 871 [3d Dept 1998]).

In contrast, section 23-1.21 (e) (3) has been held to be sufficiently concrete (*see Schroeder v Kalenak Painting & Paperhanging, Inc.*, 27 AD3d 1097, 1099 [4th Dept], *affd* 7 NY3d 797 [2006]; *Losurdo v Skyline Assoc., L.P.*, 24 AD3d 1235, 1237 [4th Dept 2005]).

Although defendants assert that plaintiff was not working on a “step of a stepladder 10 feet or more above the footing,” the rule also requires standing stepladders to be used on “firm, level footings.” Moreover, section 23-1.21 (b) (4) (ii) requires that “[a]ll ladder footings shall be firm.” Given plaintiff’s testimony that the ladder fell to his right and collapsed, factual issues remain as to whether violations of sections 23-1.21 (b) (4) (ii) and 23-1.21 (e) (3) proximately caused his accident (*see Cevallos*, 78 AD3d at 549; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006] [where plaintiff fell when ladder shifted, issues of fact existed as to whether violations of sections 23-1.21 (b) (4) (ii) and 23-1.21 (e) (3) proximately caused the plaintiff’s accident]).

However, the court finds that the remaining cited regulations are inapplicable or, evidence is lacking to support a violation. Section 23-1.21 (a) does not apply here, because plaintiff was not using a “metal or fiberglass ladder which is 10 feet or more in length.” Plaintiff testified that he was using a four-foot wooden ladder (Plaintiff EBT, at 26). There is no evidence that the accident was caused by any insufficiency in the strength of the form of the ladder in violation of Section 23-1.21 (b) (1) (*see Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 1169 [4th Dept 2007]; *Cruz v Seven Park Ave. Corp.*, 5 Misc 3d 1018 [A], *6, 2004 NY Slip Op 51417 [U] [Sup Ct, Kings County 2004]). There is also no evidence to support a violation under section 23-1.21 (b) (3), because there is no evidence that the ladder was defective or improperly maintained, other than the fact that plaintiff fell (*cf. Fernandes v Equitable Life Assur. Socy. of United States*, 4 AD3d 214, 215 [1st Dept 2004]; *De Oliveira v Little John's Moving*, 289 AD2d 108, 109 [1st Dept 2001]).

Therefore, plaintiff has adequately alleged a violation of Labor Law § 241 (6) to the extent it is predicated on 12 NYCRR 23-1.21 (b) (4) (ii) and 23-1.21 (e) (3).

Labor Law § 200/Common-Law Negligence

Defendants move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, arguing that there is no evidence that they directed, supervised, or controlled plaintiff's work or created or had notice of any dangerous condition.

Plaintiff counters that there are issues of fact as to whether defendants had actual or constructive notice of the following: the defective condition of the ladder; the condition of the floor where the ladder was placed; and the manner in which the step ladder was used on the flooring.

Labor Law § 200¹ is merely a codification of the common-law duty imposed on owners and general contractors to maintain a safe work site (*Rizzuto*, 91 NY2d at 352; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]). “[A]n implicit precondition to this duty is that the party to be charged with that obligation ‘have the *authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition*’” (*Rizzuto*, 91 NY2d at 352, quoting *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Where the injury arises out of the means or methods of the work, the plaintiff must establish that the owner or contractor supervised or controlled the activity giving rise to the injury (*Geonie v OD & P NY Ltd.*, 50 AD3d 444, 445 [1st Dept 2008]; *Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350 [1st Dept 2006]). However, where the plaintiff’s injury arises out of a premises defect, the owner or general contractor may only be held liable if it created or had actual or constructive notice of the dangerous condition (*Hernandez v Columbus Ctr., LLC*, 50 AD3d 597, 598 [1st Dept 2008]; *Murphy v Columbia Univ.*, 4 AD3d 200, 201-202 [1st Dept 2004]).

A defective ladder may constitute a dangerous or defective condition (*see Cruz v Kowal Indus.*, 267 AD2d 271, 272 [2d Dept 1999] [owner’s fault could be predicated upon actual or constructive notice of a defective ladder present on the site]; *Higgins v 1790 Broadway Assoc.*,

¹Labor Law § 200 (1) provides that “All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.”

261 AD2d 223, 224-225 [1st Dept 1999] [presence of defective ladder in building constituted a dangerous condition, because it was reasonably foreseeable that a worker might use the ladder and sustain injury]).

Courts have also found that where a ladder shifts, plaintiff is injured as a result of the means and methods of his work, and not because of a dangerous or defective condition on the premises (*McFadden v Lee*, 62 AD3d 966, 967 [2d Dept 2009] [where plaintiff was injured when ladder slipped out from under him, he was injured as a result of the manner in which his work was performed]; *De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 192 [1st Dept 2003] [where plaintiff fell off ladder that shifted, property manager could not be liable absent supervision and control over the manner and method in which plaintiff performed his work]).

In either case here there is no evidence that defendants had notice of a defective condition, or, that defendants supervised or controlled plaintiff's work. Pursuant to the trade contract between DeMatteis and Prince, Prince was required to "furnish all materials (which shall be new), fixtures, equipment, labor and supervision necessary for the prosecution and completion of the Work" (Nonnenmacher Affirm., Exh. D, ¶ 1). Plaintiff testified that he received his instructions from his supervisor, John Ree (Plaintiff EBT, at 21-22). Plaintiff also testified that Prince provided his tools and equipment, including ladders (*id.* at 24-25). Although plaintiff argues that defendants had notice of the manner in which the step ladder was used, "[m]ere notice of unsafe methods of performance is not enough to hold the owner or general contractor vicariously liable under this section [or in common-law negligence]" (*Colon v Lehrer, McGovern & Bovis*, 259 AD2d 417, 419 [1st Dept 1999]; *see also Dennis v City of New York*, 304 AD2d 611, 612 [2d Dept 2003] [noting that "no liability will attach to the owner solely because it may

have had notice of the allegedly unsafe manner in which work was performed”]).

Therefore, the part of defendants’ cross motion seeking dismissal of plaintiff’s Labor Law § 200 and common-law negligence causes of action is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 001) of plaintiff Rustum Khan for partial summary judgment as to liability under Labor Law § 240 (1) is granted against defendants 1765 First Associates LLC and Leon D. DeMatteis Construction Corporation, with the issue of plaintiff’s damages to await the trial in this matter; and it is further

ORDERED that the cross motion of defendants 1765 First Associates LLC and Leon D. DeMatteis Construction Corporation for summary judgment is granted to the extent of dismissing plaintiff’s Labor Law § 200 and common-law negligence claims and to the extent that plaintiff predicates his Labor Law § 241 (6) claim on violations of 12 NYCRR 23-1.21 (a), (b) (1), (b) (3), and (e) (2), and is otherwise denied; and it is further

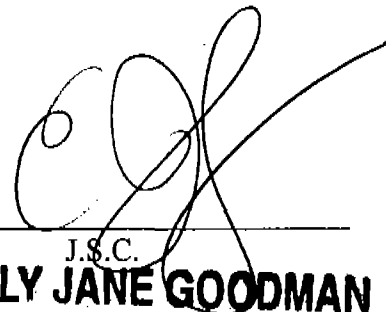
ORDERED that the parties appear on June 13, 2011 to pick a jury, with the trial commencing immediately thereafter.

This constitutes the Decision and Order of the Court.

Dated: April 4, 2011

FILED
APR 13 2011
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.
EMILY JANE GOODMAN