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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: HON. ANTHONY L. PARGA
JUSTICE

----------X **PART 8**

ROSSINI FERDINAND.,

INDEX NO. 17839/08

Plaintiff,

-against-

MOTION DATE: 3/31/11
SEQUENCE NO. 02

RUNE M. JOSEPHSON and
RAPID REPAIRS KRAZY KUSTOMS,

Defendants.

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Notice of Motion, Aff. & Exs.....1
Affirmation in Opposition & Exs.....2
Reply Affirmation.....3

Upon the foregoing papers, defendant Rune M. Josephson's motion for summary judgment dismissing plaintiff's causes of action based upon the defendants' alleged violation of Labor Law Sections 240(1) and 241(6) is granted, and for summary judgment dismissing plaintiff's causes of action based upon common law negligence and a violation Labor Law Section 200 is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff, Rossini Ferdinand, on August 4, 2006, at the premises located at 45G Burch Avenue, Amityville, New York. Within his complaint, the plaintiff alleges causes of action sounding in common-law negligence and violations of Labor Law Sections 200, 240(1), and 241(6). At the time of the alleged accident, defendant Rune M. Josephson was the owner of the premises, which was leased to defendant Rapid Repairs Krazy Kustoms (hereinafter "Rapid Repairs") pursuant to a written commercial lease agreement. Rapid Repairs is an auto body business that is in the business of repairing the exterior of vehicles. On the date of the accident, plaintiff was employed by Rapid Repairs. The supervisor for Rapid Repairs was plaintiff's long-

time friend, Anthony (Tony) Baal. Anthony Baal's mother-in-law, Sandra D. Atena, was the owner of the business, Rapid Repairs. Plaintiff had only worked for Rapid Repairs for five days prior to the date of the accident. Plaintiff was hired as a "helper" whose duties included washing cars, scratch repair, dent repair, sweeping the floors, and keeping the garage clean. Plaintiff never performed any construction work as part of his duties with Rapid Repairs.

On the date of the accident, Mr. Baal instructed plaintiff to "clean the shop." Plaintiff was in the process of cleaning the shop when the accident occurred. Specifically, plaintiff was moving a car hood into the attic when the accident occurred. The car hood measured five feet by five feet in diameter and weighed approximately 100 pounds. Another Rapid Repair employee was helping plaintiff move the car hood into the attic. The plaintiff had never been into the attic of the premises prior to the time of the accident. Plaintiff and his co-worker carried the car hood up one flight of stairs to get into the attic. Once in the attic, they walked on a wooden beam for 20 to 30 paces. At some point thereafter, plaintiff lost his balance and stepped onto a sheetrocked portion of the attic which was covered with insulation. Plaintiff claims that there was no flooring in the attic, just insulation and sheetrock. As a result, plaintiff fell through the sheetrock and onto the floor of the auto body shop below.

Mr. Baal testified at his deposition that the attic where the plaintiff's accident occurred was semi-finished and was part of the leased premises. He further testified that the attic was used as a storage room for the business, Rapid Repairs. Mr. Baal inspected the attic prior to Rapid Repair taking possession of the premises pursuant to the lease and testified that the attic floor was comprised of "ply board."

Defendant Rune M. Josephson testified that he was the owner of the premises located at 45G Burch Avenue in Amityville. He testified that the premises were leased to tenant Rapid Repairs, who bought the business from Mr. Josephson's prior tenant, La-Roe. Mr. Josephson testified that the attic where plaintiff's accident occurred was erected by La-Roe during its tenancy. He further testified that he never visited the premises to inspect the property during Rapid Repair's tenancy, although he would sometimes take his vehicles to Rapid Repairs for repairs. Mr. Josephson denied any involvement in the construction or insulation of the attic at issue.

The lease between Mr. Josephson and Rapid Repairs required repairs of the premises to be made by the tenant. In the lease, the landlord reserved the right to enter the leased premises at reasonable hours to inspect the premises.

Defendant Rune M. Josephson argues that he is entitled to summary judgment upon the grounds that plaintiff was not engaged in the type of activity covered by the Labor Law, and that he cannot be held liable for the plaintiff's injuries since the lease required the tenant, Rapid Repairs, to make all repairs to the property. Defendant Josephson argues that he had no duty to

act to remedy the alleged defect, as the duty to make repairs remained with the tenant, Rapid Repairs. As such, he argues that plaintiff cannot maintain a negligence claim against him.

With respect to plaintiff's allegations that the defendants violated Labor Law Sections 200, 240(1), and 241(6), defendant Josephson argues that the Labor Law does not apply to the type of activity in which plaintiff was engaged, as plaintiff was not involved in work on a construction project, demolition project, or excavation project.

With respect to plaintiff's allegation that defendant violated Section 200, defendant Josephson argues that he did not supervise or control plaintiff's work and therefore cannot be held liable under Section 200 of the Labor Law. With respect to plaintiff's allegation that defendant Josephson violated Section 240(1) of the Labor Law, defendant Joseph argues that plaintiff was not engaged in the type of activity for which the statute was intended, as the plaintiff was not involved in the altering of a building or structure. Defendant argues that "routine" maintenance is not a covered activity under Section 240(1) of the Labor Law. Lastly, with respect to Labor Law §241(6), defendant argues that Section 241(6) does not apply as the plaintiff was not involved in the performance of construction, renovation, excavation or demolition work, as required by Labor Law §241(6). Defendant Josephson further argues that under Law Section §241(6), plaintiff must allege and prove a specific violation of the Industrial Code of the State of New York. Defendant contends that plaintiff alleges that the defendants violated section 23-1.21 of the Industrial Code, entitled "Ladder and Ladderways," but argues that said section is not applicable as plaintiff was not utilizing a ladder or ladderway at the time of the accident. Accordingly, defendant Josephson argues that plaintiff's allegations that he violated Sections 200, 240(1) and 241(6) of the Labor Law should be dismissed as against him.

In opposition, plaintiff argues that there are questions of fact as to whether the defendant Rune M. Josephson is an out of possession landlord and whether he was responsible for the defective structural condition that existed on his leased premises. Plaintiff argues that Mr. Josephson maintained his own shop next to the one leased to Rapid Repairs on the same premises, 45 Burch Avenue, and, as such, was on the premises where the accident occurred every day. Plaintiff also argues that section 14 of the lease states that if the leased premises becomes damaged by fire, casualty or structural defects, the landlord "shall promptly repair such damage at the cost of the landlord." Plaintiff contends that after the accident, the defendant Rune M. Josephson had the hole in the attic repaired at his cost. Plaintiff argues that Mr. Josephson was contractually obligated under the lease to make structural repairs and that prior to the date of plaintiff's accident, Mr. Josephson was aware that the attic did not have a floor and that his tenant was using the attic for storage.

Defendant Rune M. Josephson has demonstrated a prima facie showing of entitlement to summary judgment. The proponent of a summary judgement motion "must make 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." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition, plaintiff has failed to raise a triable issue of fact sufficient to defeat defendant's motion for summary judgment dismissing plaintiff's causes of action which allege violations of Labor Law Sections 240(1) and 241(6), but has, however, raised triable issues of fact regarding plaintiff's causes of action sounding in common law negligence and the violation of Labor Law Section 200. Accordingly, defendant Rune M. Josephson's motion for summary judgment is granted only to the extent that plaintiff's causes of action alleging that the defendants violated Sections 240(1) and 241(6) are dismissed against all defendants, but denied with respect to plaintiff's causes of action which allege common law negligence and a violation of Labor Law Section 200.

The intent of Labor Law Sections 200, 240 and 241 was to provide for the health and safety of employees. (*Mordkofsky v. V.C.V. Dev. Corp.*, 76 N.Y.2d 573, 563 N.E.2d 263 (1990)). Section 200 codifies the common law duty of an employer to provide a safe work place, and the intent of Sections 240 and 241 were to place responsibility for safety practices at building construction jobs on the owner and general contractor. (*Id.*).

Plaintiff was not engaged in the type of activity covered by Labor Law §240(1) or §241(6). With respect to Labor Law §240(1), "the protection afforded by Labor Law §240 is limited to cleaning that is 'incidental to building construction, demolition and repair work.'" (*Broggy v. Rockefeller Group, Inc.*, 30 A.D.3d 204, 818 N.Y.S.2d 6 (1st Dept. 2006), *quoting, Brown v. Christopher St. Owners Corp.*, 211 A.D.2d 441 (1st Dept. 1995)). In order for an activity not performed at a construction site to fall within the purview of Labor Law §240(1), the activity must involve making a significant physical change to a building or structure, so as to constitute an alteration within the meaning of the statute. (*Joblon v. Solow*, 91 N.Y.2d 457, 695 N.E.2d 237 (1998); *See also, Broggy*, 30 A.D.3d 204 (1st Dept. 2006)). The cleaning being performed by the plaintiff herein, involving the moving of the car hood into the attic, was not related to building construction, demolition or repair work, and did not involve making a significant physical change to a building or structure. Accordingly, Labor Law §240(1) does not apply to the instant action.

Furthermore, all work related to falls from elevated surfaces or safety devices do not fall within the ambit of Labor Law 240(1). (*Joblon v. Solow*, 91 N.Y.2d 457, 695 N.E.2d 237

(1998)). In order to prevail on a claim arising out of Section 240(1), a plaintiff must establish both that the statute was violated and that the violation was the proximate cause of the plaintiff's injuries. (See, *Bland v. Manocherian*, 66 N.Y.2d 452, 488 N.E.2d 810 (1985); *See also, Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 695 N.E.2d 709 (1998)). Labor Law 240(1) benefits only those persons injured by a fall from an elevated height due to a lack of, or defective, safety devices designed to prevent such a fall and does not establish a rule of law to the effect that anyone who falls off a ladder may recover damages from the owner. (*Id.* at 462-463). Plaintiff's injuries as a result of his fall through the sheetrocked attic floor were not due to a lack of, or defective, safety devices designed to prevent such a fall.

With respect to Labor Law §241(6), said section provides that "all areas in which construction, excavation or demolition work is being performed shall be so constructed, assured, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to persons employed therein or lawfully frequenting such places." In the instant action, there was no ongoing construction or excavation work being done. As such, Labor Law 241(6) does not apply. *(See, Lioce v. Theatre Row Studios*, 7 A.D.3d 493, 776 N.Y.S.2d 89 (2d Dept. 2004); *Nagel v. D & R Realty Corp.*, 99 N.Y.2d 98, 782 N.E.2d 558 (2002)). The type of cleaning work in which plaintiff was engaged at the time of the accident does not constitute construction, excavation, or demolition work, as required under Labor Law Section 241(6). *(See, Casey v. Niagra Mohawk Power Point*, 269 A.D.2d 775, 703 N.Y.S.2d 618 (4th Dept. 2000)). Furthermore, in opposition to defendant Josephson's motion, the plaintiff fails to demonstrate that the defendant violated an Industrial Code regulation setting forth a specific standard of conduct applicable to working conditions which existed at the time of the accident. (*Roberts v. Worth Construction*, 21 A.D.3d 1074, 802 N.Y.S.2d 177 (2d Dept. 2005)). In order to hold a defendant liable under Labor Law §241(6), a plaintiff must demonstrate the violation of an Industrial Code regulation setting forth a specific standard of conduct applicable to working conditions which existed at the time of the accident. (*Roberts v. Worth Construction*, 21 A.D.3d 1074, 802 N.Y.S.2d 177 (2d Dept. 2005); *See also, Nobre v. Nynex Corp.*, 2 A.D.3d 602, 769 N.Y.S.2d 556 (2d Dept. 2003)).

Accordingly, as the plaintiff was not engaged in the type of activity covered by Labor Law Sections 240(1) and 241(6), plaintiff's causes of action alleging violations of Labor Law Sections 240(1) and 241(6) are dismissed against all defendants.

This Court's finding that the defendants cannot be found liable pursuant to Labor Law Sections 240(1) and 241(6) does not absolve the defendants of liability for common-law negligence and negligence pursuant to Labor Law §200. (*See, Fuller v. Spiesz*, 53 A.D.3d 1093, 861 N.Y.S.2d 896 (4th Dept. 2008)). Labor Law §200 is the codification of the common-law duty to provide workers with a safe work environment. (*Everitt v. Nozkowski*, 285 A.D.2d 442 (2d

Dept. 2001)). To establish liability against an owner pursuant to Labor Law §200 and common-law negligence, it must be established that the owner exercised supervision or control over the work performed at the site, **or** had actual or constructive notice of the allegedly unsafe condition. (*Parisi v. Loewen Development of Wappinger Falls, LP*, 5 A.D.3d 648, 774 N.Y.S.2d 747 (2d Dept. 2004)(emphasis added); *See also, Bonura v. KWK Assoc., Inc.*, 2 A.D.3d 207, 770 N.Y.S.23d 5 (1st Dept. 2003)). In the instant action, there is a question of fact as to whether defendant Rune M. Josephson had actual or constructive notice of the allegedly unsafe condition of the sheetrocked floor of the attic which caused plaintiff's accident. Mr. Josephson testified at his deposition that the prior tenant had constructed the attic and that the attic was in existence at the time that Rapid Repairs entered into the lease of his premises. Accordingly, there is a question of fact as to whether Mr. Josephson knew or should have known of the defect in the attic flooring. In addition, the lease between Mr. Josephson and Rapid Repairs placed responsibility for "structural" repairs upon the landlord, raising a question of fact as to whether defendant Josephson had a contractual obligation to repair the alleged unsafe flooring condition in the attic.

As questions of fact preclude the granting of summary judgment to defendant Josephson upon plaintiff's causes of action for common law negligence and a violation of Labor Law §200, defendant Josephson's motion is denied with respect to plaintiff's causes of action for common law negligence and Labor Law §200.

This constitutes the decision and order of this Court.

Dated: May 18, 2011

Anthony L. Parga, J.S.C.

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