

**Canas v Harbour at Blue Point Home Owners
Assoc., Inc.**

2011 NY Slip Op 31844(U)

June 28, 2011

Supreme Court, Suffolk County

Docket Number: 07-1096

Judge: W. Gerard Asher

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INDEX No. 07-1096
CAL. No. 10-01579OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-15-10
ADJ. DATE 2-10-11
Mot. Seq. # 004 - MD

-----X
RODOLFO CANAS, :
 :
 Plaintiff, :
 :
 - against - :
 :
 THE HARBOUR AT BLUE POINT HOME :
 OWNERS ASSOCIATION, INC., and :
 CAMCO SERVICES OF NY, INC., :
 :
 Defendants. :

VALDEBENITO & ARDITO, LLP
Attorneys for Plaintiff
1399 Franklin Avenue, Suite 303
Garden City, New York 11530

CALLAN, KOSTER, BRADY & BRENNAN, LLP
Attorney for Defendants/Third-Party Plaintiffs
One Whitehall Street, 10th Floor
New York, New York 10004

DEVITT, SPELLMAN, BARRETT, LLP
Attorney for Third-Party Defendant
50 Route 111, Suite 314
Smithtown, New York 11787

-----X
THE HARBOUR AT BLUE POINT HOME :
 OWNERS ASSOCIATION, INC., and :
 CAMCO SERVICES OF NY, INC., :
 :
 Third-Party Plaintiffs, :
 :
 -against- :
 :
 JAM PAINTING, INC., :
 :
 Third-Party Defendant. :
-----X

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 15; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 16-22; Replying Affidavits and supporting papers 23-24; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by the plaintiff, Rodolfo Canas, pursuant to CPLR 3212 for summary judgment on the causes of action premised upon the defendants' alleged violation of Labor Law §240 (1) and §241(6) is denied.

In his complaint, the plaintiff, Rodolfo Canas, asserts that on November 20, 2006, he was an employee of JAM Painting, Inc., and was engaged in painting the exterior of the buildings at The Harbour at Blue Point,

located at Harbour Drive, Blue Point, New York, when he fell off a ladder and sustained personal injury. The causes of action are premised upon the defendants' alleged negligence, violation of Labor Law §§ 200, 240, and 241, and the Industrial Code of the State of New York §23-1.2(a), 23-1.3, 23-1.5, 23-1.16, 23-1.21, 23-1.7, 23-5, 23-5.1, 23-5.3, 23-5.18, 23-5.8, and 23-5.9.

A third-party action has been commenced by the defendants, The Harbour at Blue Point Homeowners Association, Inc. and Camco Services of NY, Inc., against the plaintiff's employer, JAM Painting, Inc., wherein the third-party plaintiffs assert a cause of action for breach of contract and seek contractual and common law indemnification, contribution, and to be held harmless, premised upon JAM Painting's alleged negligence in violation of Labor Law §§ 200, 240, and 241.

The plaintiff seeks summary judgment on the basis that the defendants violated Labor Law §240(1) and §241(6), and the various sections of the Industrial Code, as stated, in that the defendants failed to provide proper safety equipment, harnesses and scaffolding, to prevent him from falling and failed to secure the ladder upon which the plaintiff was working when it slipped, causing him to fall.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for his failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1989]). The opponent must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleading are real and capable of being established at a trial (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party (CPLR 3212 [b]).

In support of this motion, Rodolfo Canas has submitted, inter alia, an attorney's affirmation; the affidavit of Rodolfo Canas; copies of the pleadings, answers, the plaintiff's verified bills of particulars, and the third-party summons and complaint; copies of the signed transcripts of the examinations before trial of Rodolfo Canas dated July 31, 2008, and John A. Mercurio dated July 9, 2009, and the unsigned copies of the transcripts of the examinations before trial of Marianne Scopo on behalf of The Harbour at Blue Point Homeowners Association, Inc. dated January 14, 2009, and Michael Hammersglag on behalf of CAMCO dated December 22, 2008. The unsigned transcripts are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are, therefore, not considered.

In opposition to this motion, the defendants/third-party plaintiffs have submitted an attorney's affirmation; copies of the pleadings, discovery demands, plaintiff's verified and supplemental bills of particulars; and a copy of the plaintiff's transcript of his examination before trial.

In his supporting affidavit, Rodolfo Canas avers that on November 20, 2006, he was employed as a painter by JAM Painting, Inc., and was injured at the job site at the premises known as The Harbour at Blue Point (The Harbour). He was working on the exterior of 42 Harbor Drive, painting the shingles of the condominium units as part of an overall refacing project of the units. At his deposition, Canas testified that he had been working at The Harbour for about two to three weeks prior to the accident. During that time, he did not speak to anyone from The Harbour or Camco Services of NY, Inc. (Camco). He did not report daily to his boss, John Mercurio, but reported daily to his co-worker, Rene Castro. He stated that no one from The Harbour or Camco provided him with any equipment for performing his job. The equipment he used to perform his job consisted of an extension ladder, paint, brushes, and rags, which were provided to him by Rene Castro. He used the same ladder during the time that he worked at The Harbour. He had experienced no problems with the ladder and made no complaints about it prior to the accident.

Canas testified that when he arrived at work on the date of the accident, he placed the ladder on the floor of the deck which was made of "fake wood" and was wet, as it had rained during the night. He used rags to dry the deck surface before positioning the ladder to prevent the ladder from sliding. He painted for about two and one half hours, and moved the ladder about three times prior to the accident, each time drying the deck surface with the rags. The last time he moved the ladder, he made sure the metal feet on the ladder were secure and firm on the deck. He then climbed the ladder to about eighteen feet to continue painting, when the ladder slid and he fell. He stated that the ladder was not secured to the wall of the building. No one held the ladder to secure it for him while he painted. Prior to the date of the accident, he did not have to place the ladder on a deck to paint. Mario Mesa and Rene Castro were both painting near him when the accident occurred. Prior to the accident, he had not been instructed to use, nor was he provided with, safety equipment. Prior to the accident, he saw other workers at the site replacing decks as part of the renovation.

John Mercurio testified at his examination before trial that he is a self-employed painter. The name of his business is JAM Painting, Inc. He had prior contracts to do exterior painting at The Harbour, and thought it was the third time his company was working at the premises when Canas was injured. He did not enter into a written contract with The Harbour for this particular job, as The Harbour had hired another contractor. Mercurio stated that he spoke with Frank Ceccere from Camco in about September, 2006, and had contact with two members of the Board for the condo concerning the subject paint job. The Harbour was firing the current painter, and he was asked to complete the painting. He commenced the work in October 2006. Ceccere did not ask him to sign a contract. However, he thought that once the job started, The Harbour provided a contract from their management company, "The Management Company." However, he did not remember signing any paper work for either The Harbour, Ceccere, Camco, or The Management Company. He continued that he did provide an "Addendum to the Agreement between JAM and The Harbour at Blue Point, but he did not know if there had been a written agreement. He then testified that any agreement was with Camco and that he was paid by Camco.

Mercurio testified that Rodolfo Canas was his employee. He stated that The Harbour provided the paint to his company, and that he then provided Canas with the ladder, paint and brushes for the job. He continued that he gave Canas no safety equipment, such as a harness, scaffolding, ropes, nets, or anything to attach himself to the building, or to secure the ladder to the building while he was using it. He never instructed his workers to use any type of safety equipment for the project and, he continued, his workers did not usually use spotters to hold the ladders. He stated no one from The Harbour or Camco provided him with any equipment. Mercurio testified that Canas reported to him and that he told Canas where to paint, but he did not tell him how to paint because Canas knew how to paint. He did not believe that anyone from The Harbour or Camco had any direct contact with Canas or instructed Canas where or how to paint. Mercurio testified that at no time did Canas

complain to him, or to anyone else, about the ladders being used, where the ladders were placed for painting, and that Canas did not advise anyone that the ladder he was using was slipping on the deck. He learned of the accident when Rene Castro called him. He was advised by Castro that the ladder Canas was standing on while he was painting “slipped out” on the deck. He did not know which ladders were being used on the Trex deck at the time of the accident. He stated the extension ladders were metal, with rubber feet at the bottom which could be adjusted by hand.

LABOR LAW §240 (1)

Labor Law §240 (1) provides that “[a]ll contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, 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.”

“New York State Labor Law §240 (1) is applicable to work performed at heights or where work itself involves risks related to differentials in elevation” (*see, Plotnick et al v Wok’s Kitchen Incorporated, et al*, 21 AD3d 358, 800 NYS2d 37 [2nd Dept 2005]; *Handlovic v Bedford Park Development, Inc.*, 25 AD3d 653, 811 NYS2d 677 [2nd Dept 2006]). Labor Law §240 (1) was enacted to “prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*Cruz v The Seven Park Avenue Corporation et al*, 5 Misc3d 1018A, 799 NYS2d 159 [Sup. Ct., Kings County 2004]).

In *Ortega et al v Puccia et al*, 57 AD3d 54, 866 NYS2d 323 [2nd Dept, 2008], the court set forth that Labor Law §240 is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices. The duties articulated in Labor Law § 240 are nondelegable, and liability is absolute as to the general contractor or owner when its breach of the statute proximately causes injury. The court continued that a cause of action under section 240 (1) of the Labor Law imposes a nondelegable duty, which applies when an injury is the result of one of the elevation-related risks contemplated by that section, and which prescribes safety precautions to protect laborers from unique gravity-related hazards, such as falling from an elevated height, or being struck by a falling object where the work site is positioned below the level where materials or leads are being hoisted or secured (*Amigon v Maxwin USA, Inc.*, 2008 NY Slip Op 32025U [Sup. Ct. Queens County 2008]).

The legislative history of Labor Law § 240 (1) and § 241, makes clear the legislature’s intent to achieve the purpose of protecting workers by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor (*Klein v City of New York*, 89 NY2d 833, 652 NYS2d 723 [1996]). Although “owner” and “contractor” are not defined in Labor Law § 240 (1), legislative history makes it clear that the nondelegable duty imposed by the statute to maintain safe working conditions devolves on those who have power to enforce safety standards and to choose responsible contractors (*Clute v Ellis Hosp.*, 184 AD2d 942, 585 NYS2d 140 [3rd Dept 1992]). Even where there is no evidence to show that the owner or general contractor directed the work, the basis of their liability remains vicarious under the theory of implied indemnification (*Guillory v Nautilus Real Estate Inc.*, 208 AD2d 336, 624 NYS2d 110 [1st Dept 1995]).

In *Klein v City of New York*, 89 NY2d 833, 652 NYS2d 723 [1996], an employee was injured when the

ladder upon which he had ascended slipped out from under him and caused him to fall. The Court of Appeals affirmed the Appellate Court's finding that the employee had established a prima facie case that the employer violated Labor law § 240 (1) by failing to ensure the proper placement of the ladder due to the condition of the greasy floor. Because neither the employer nor the company had presented any evidence of a triable issue of fact relating to the prima facie case or to the employee's credibility, summary judgment was properly awarded to the employee.

Here, the plaintiff has asserted that the ladder did not give him proper protection while he was painting at the owners' premises. He was working at an elevated height, putting him at a significant risk for a gravity related accident (*see, Delong v State Street Associates, LP*, 211 AD2d 891, 621 NYS2d 172 [3rd Dept 1995]). The ladder was not secured in any way. It slid and the plaintiff fell, despite the plaintiff's attempts to dry the Trex deck surface which was moist from an earlier rainfall, and despite his adjusting the rubber swivels on the ladder (*see, Olberding v Dixie Contracting Inc*, 302 AD2d 574, 757 NYS2d 565 [2nd Dept 2003]).

At trial, the plaintiff is required to prove that there was a violation of Labor Law § 240 (1) (*Skalko v Marshall's Inc.*, 229 AD2d 569, 646 NYS2d 140 [2nd Dept 1996]). The court in *Skalko v Marshall's, Inc.* held that the issue as to whether the scaffold upon which the plaintiff was working provided the proper protection was ultimately a question for the jury. It further stated that there was a triable issue as to whether the scaffold was defective or whether the painter's injuries were actually caused by his own conduct. Here, the plaintiff testified that he used the ladder on the moist or "humid" deck surface, although he continued to dry it with rags and was aware the ladder could slip on the deck surface. There was no testimony by the plaintiff that he made sure the feet on the ladder were also dried prior to placing the ladder into position, or that his rags were sufficiently dry after using them several times to eliminate moisture on the deck. Although the plaintiff testified that the surface was dry, the statement is conclusory and unsupported by any admissible testimony from his co-workers or any one else.

The plaintiff also claims that the defendants violated the Industrial Code §23-1.7 (d)¹, which, in pertinent part, unequivocally directs employers not to suffer or permit any employee to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe footing by requiring that any foreign substance which may cause slippery footing be removed to provide safe footing. The plaintiff herein did not report the wet surface to Castro or to any one else, raising factual issue concerning whether anyone was aware that the surface was wet. There are factual issues concerning whether the defendant had constructive notice of the alleged unsafe condition of the deck flooring, thus precluding summary judgment (*see, Greco v Purdy*, 222 AD2d 652, 636 NYS2d 108 [2nd Dept 1995]). Where a plaintiff is injured in a fall from a ladder, which is not otherwise shown to be defective, the issue of whether the ladder provided the plaintiff with the proper protection required under Labor Law §240 (1) is a question of fact for the jury (*Moreta v State of New York*, 272 AD2d 593, 709 NYS2d 829 [2nd Dept 2000]; *Benefield v Halmar Corporation*, 264 AD2d 794, 695 NYS2d 394 [2nd Dept 1999]).

Accordingly, the plaintiff's application for summary judgment in his favor on the cause of action premised upon the defendant's alleged violation of Labor Law §240 (1) is denied.

¹ See, affidavit of plaintiff's counsel at paragraph 16.

LABOR LAW §241 (6)

New York State Labor Law §241(6) provides in pertinent part that “All areas in which construction, excavation or demolition 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 persons employed therein or lawfully frequenting such places.”

It is axiomatic that the statutory duties imposed by New York State Labor Law §241(6) place ultimate responsibility for safety practices on owners of the worksite and general contractors (*Bopp v A.M. Rizzo Electrical Contractors, Inc. et al*, 19 AD3d 348, 796 NYS2d 153 [2nd Dept 2005]). Lack of actual or constructive notice of an unsafe condition is not a prerequisite to liability under Labor Law § 241 (6) (*Rizzuto v L. A. Wegner Contracting Co., Inc.*, 91 NY2d 343, 670 NYS2d 816 [1998]). Labor Law § 241(6) imposes liability upon a general contractor for the negligence of a subcontractor, even in the absence of control or supervision (*L. A. Wegner Contracting Co., Inc.*, supra). “Labor Law §241(6), which was enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a nondelegable duty upon owners and general contractors, and their agents to comply with the specific safety rules set forth in the Industrial Code” (citing *Ross v Curtis Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49).

To support a cause of action under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of a safety regulation that is applicable given the circumstances of the accident, and must set forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*Ares v State*, 80 NY2d 959, 590 NYS2d 874 [1992]; *Ross v Curtis Palmer Hydro-Elec. Co.*, supra; see also, *Adams v Glass Fab.*, 212 AD2d 972, 624 NYS2d 705 [4th Dept 1995]; *Marin v The City of New York*, 15 Misc3d 1003A, 798 NYS2d 710 [Sup. Ct, Kings County 2004]; *Mahoney v Madeira Associates*, 32 AD3d 1303, 822 NYS2d 190 [4th Dept 2006]). Unlike a violation of an explicit and definite statutory provision which demonstrates negligence as a matter of law, a violation of Labor Law § 241(6) is merely some evidence which the jury may consider on the question of defendants’ negligence (*L. A. Wegner Contracting Co., Inc.*, supra). An owner or general contractor may raise any valid defense to the imposition of vicarious liability under Labor Law §241 (6), including contributory and comparative negligence (*L. A. Wegner Contracting Co., Inc.*, supra).

Unlike Labor Law §200, Labor Law §241(6) does not require the plaintiff to show that the defendant exercised supervision or control over the worksite (*Mendoza v Cornwall Hill Estates*, 199 AD2d 368, 605 NYS2d 308 [2nd Dept 1993]). “Thus once it has been alleged that a concrete specification of the Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff’s injury. If proven, the general contractor (or owner, as the case may be) is vicariously liable without regard to his or her fault” (*McDevitt et al v Cappelli Enterprises, Inc. et al*, 16 Misc3d 1133A, 847 NYS2d 903 [Sup. Ct., New York County 2007]).

Here the plaintiff claims violations relating to 12 NYCRR §§ 23-1.2(a), 23-1.3, 23-1.5, 23-1.16, 23-1.21, 23-1.7, 23-5, 23-5.1, and 23-5.3, 23-5.18, 23-5.8, and 23-5.9. 12 NYCRR § 23-1.5 is a general safety regulation and is insufficient to support a claim under Labor Law §241(6) (*McDevitt v Cappelli Enterprises, Inc.*, 16 Misc3d 1133A, 847 NYS2d 903 [Sup. Ct. New York County 2007]). 12 NYCRR § 23-1.2 provides for findings of fact. Section 23-1.3 provides that the rule applies to persons employed in construction, demolition and excavation operations who are to be provided with safe working conditions. 12 NYCRR § 23-5.1 provides for general provisions for scaffolds; § 23-5.3 provides for general provisions for metal scaffolds; § 23-5.18 applies to manually-propelled mobile scaffolds; § 23-5.8 is relative to all suspended scaffolds; and § 23-

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5.9 applies to two-point suspension scaffolds. These sections are general and inapplicable to the facts and circumstances alleged herein, or they apply to scaffolds and not, as alleged herein, to ladders.

12 NYCRR § 23-1.7 provides for protection from general hazards. Section (d), in pertinent part, unequivocally directs employers not to suffer or permit any employee to use a slippery floor or walkway, and also imposes an affirmative duty on employers to provide safe footing by requiring that any foreign substance which may cause slippery footing to be removed to provide safe footing. 12 NYCRR § 23-1.21(b) (ii) provides that all ladder footings shall be firm and that slippery surfaces shall not be used as ladder footings. Subsection 23-1.21 (b) (4) (iv) provides that when work is being performed from rungs higher than ten feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used. 12 NYCRR § 23-1.16 provides for safety belts and harnesses, tail lines and lifelines. Thus, it is determined that the plaintiff's allegation that the Industrial Code safety regulations were violated at the work site raises factual issues sufficient for jury consideration under Labor Law § 241 (6) (*Rizzuto v L. A. Wegner Contracting Co., Inc.*, supra).

Accordingly, that part of plaintiff's motion which seeks summary judgment in his favor based upon the Labor Law §241(6), and premised upon the alleged violation of the applicable sections of the Industrial Code of the State of New York 12 NYCRR 23, is denied.

Dated: June 28, 2011

W. Grand Asher
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION