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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 111412/2009

WALSH, MICHAEL

VS

125 WEST 31ST STREET

Sequence Number : 003

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 _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED

SEP 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/22/11

EJG

J.S.C.

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

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

MICHAEL WALSH,

Plaintiff,

-against-

125 WEST 31ST STREET ASSOCIATES, LLC, SIDNEY FETNER ASSOCIATES, INC., SEAGULL REALTY LLC, GENCO 31ST STREET ASSOCIATES, LLC, THE DURST ORGANIZATION INC. and THE ORDER OF FRIARS MINOR OF THE PROVINCE OF THE MOST HOLY NAME,

Defendants.

INDEX NO. 111429/2009
Motion Sequence 003 & 004
DECISION & ORDER

EMILY JANE GOODMAN, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

In this action for personal injuries, plaintiff Michael Walsh (Plaintiff or Walsh) moves for partial summary judgment in his favor pursuant to CPLR 3212 on the issue of liability under Labor Law § 240 (1) (Mot. Seq. 003). Defendants 125 West 31st Street Associates, LLC (125 West), Sidney Fetner Associates, Inc. (Sidney Fetner), Seagull Realty LLC (Seagull), Genco 31st Street Associates, LLC (Genco), The Durst Organization Inc. (Durst) and the Order of Friars Minor of the Province of the Most Holy Name (the Friars) (together as Defendants) oppose and cross-move to dismiss the complaint against them. Defendants also move for the same relief as requested in their cross motion (Mot. Seq. 004).

Background

Plaintiff was employed by Gotham Construction Company LLC (Gotham), a company engaged to perform work at or on the premises of 125 West 31st Street (the Building), then under

construction, owned by 125 West, managed by Sidney Fetner. Seagull, Genco and Durst had ownership interests in 125 West. The Building was about 60 stories high, primarily devoted to residential rental units, but included a rectory for the Friars. On November 18, 2006, Walsh was allegedly injured when he fell off a ladder on the ground floor of the Building. The instant action commenced on August 11, 2009, with the complaint asserting causes of action for negligence and violation of Labor Law §§ 200, 240 and 241.

At about 4:30 P.M. on November 18, 2006, after Plaintiff spent most of the day cleaning up debris on the Building's 60th floor, James (Jamie) Spagnuolo, a Gotham foreman, asked him to go downstairs and "fix the protection in the lobby." Walsh Transcript (Ex. 4 attached to Mot. Seq. 004) at 48. Walsh, according to his testimony, understood this to mean reattaching a tarp over a large doorway, where the door had not yet been installed, to help keep cold air out of the Building. He testified that Spagnuolo "told me there was a ladder down there and to get a screw gun and some screws and, you know, to rehang the tarp right away, so the cold air would not come in." *Id.* at 69. This normally entailed wrapping the tarp around a metal stud and screwing the metal stud to the wall using a screwdriver or a screw gun. *Id.* at 70.

When Walsh got to the ground floor, he found a ladder in the immediate vicinity of where he had to rehang the tarp, as Spagnuolo indicated. *Id.* at 85. He had never used it or seen it before. *Id.* at 94. He did not know who owned the ladder. *Id.* at 134. It was a 16-foot half of a 32-foot extension ladder. *Id.* at 88. The ladder was made of fiberglass or metal, and had rungs about one foot apart. *Id.* at 90. He thought the ladder was one foot to 18 inches wide. *Id.* at 92. It looked sturdy to him. *Id.* at 93, 114-115. Walsh testified that the top and bottom of the ladder had rounded edges, or only one end may have been rounded. *Id.* at 92-93, 105.

Walsh determined that the ladder would reach high enough if he leaned it against the

wall. *Id.* at 98. He thought that he would have to climb to about the tenth rung in order to screw an existing vertical stud back onto the wall, about 20 to 25 feet above the ground. *Id.* at 99, 102. The tarp was attached to the vertical stud, which had come loose from the wall. *Id.* at 126. He placed the ladder on a dry cement floor, free of debris. *Id.* at 105-106. The floor appeared smooth. *Id.* at 109. He climbed up the ladder once to determine if he had positioned it properly, and then he climbed up again holding the screw gun, after moving the ladder "a little bit." *Id.* at 127, 128, 148-149. No one held the ladder while he climbed up and down. *Id.* at 132. Each time, he climbed 12, 13 or 14 rungs. *Id.* at 150. As he reached the top of his second climb, "the ladder came out" from under him. *Id.* at 151. He did not recall whether he was still ascending or had stopped when "the ladder fell out from underneath" him. *Id.* at 153. He tried to jump away from the ladder, but his left leg got stuck inside the rungs of the ladder, and was fractured in the fall. *Id.* at 154, 160. He was removed from the job site by ambulance, admitted to the hospital and had surgery on his ankle. He returned to work in July 2007.

Spagnuolo testified that he was on the ground floor when Walsh's accident occurred, but he had not witnessed it. Spagnuolo Transcript (Ex. 3 attached to Mot. Seq. 004) at 6-7. He said he told Walsh to check the tarps on the ground floor as the work day ended, but he denied directing him to any specific ladder. *Id.* at 8-9. Walsh did not ask him which ladder to use and he never told Walsh which ladder to use. *Id.* at 11. "There was a lot of ladders in that area where he was working. A lot of people had ladders there." *Id.* at 8. While Spagnuolo got to Walsh immediately after the accident, he said that he was unable to identify the ladder Walsh used. *Id.* at 13.

Harold Fetner, an employee of Sidney Fetner, testified in behalf of all defendants except the Friars. Ex. G attached to Mot. Seq. 003. He said that the indicated defendants did not direct

the construction workers in performing their work, did not provide them with scaffolds, safety belts, safety harnesses, or ladders, and did not instruct the construction workers in how to perform their work. Fetner transcript at 21-22.

Legal Standards

"'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'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent 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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240 utilizes a standard of strict or absolute liability. *See Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280 (2003) (discussing the terminology). "[T]he failure to provide any protective devices for workers at the worksite establishes an owner or contractor's liability as a matter of law." *Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 (1985). Labor Law § 240 (1) provides that, regardless of their degree of involvement with the project, property owners and their agents "in the erection . . . 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, . . . and other devices which shall be so constructed,

placed and operated as to give proper protection to a person so employed." "It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed." *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 (1991) (internal quotation marks and citations omitted).

Discussion

Plaintiff only requests summary judgment on the issue liability for his Labor Law § 240 (1) claim. Defendants ask for dismissal of the entire complaint, including the claims for negligence and violation of Labor Law §§ 200 and 241, in their motion for summary judgment (Mot. Seq. 004) and their "amended cross motion" to Plaintiff's motion for summary judgment (Mot. Seq. 003). Plaintiff contends that Defendants' motion for summary judgment is untimely, because it was filed outside the 45-day window stated in this court's rules, incorporated into the preliminary conference order for the action. Ex. A attached to Greenberg Opp. Affirm. Generally, "CPLR 3212 (a) requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy." *Brill v City of New York*, 2 NY3d 648, 652 (2004). Defendants do not offer a good cause for the delay, but rather argue that their motion for summary judgment was "denominated" incorrectly and "is de jure a cross-motion." Mahlan Reply Affirm., ¶¶ 6, 4.

Brill, though, is not adequate authority in this instance. *Brill* rejected a summary judgment motion by defendant filed on June 18, 2002 when a note of issue was filed on June 28, 2001, almost a one-year interval and long past the 120-day limit for dispositive motions specified in CPLR 3212 (a). Significantly, no other dispositive motion was pending when defendant moved for summary judgment. In the instant action, Plaintiff filed the note of issue on January

18, 2011, and timely filed the instant motion for summary judgment on March 2, 2011 (Mot. Seq. 003). Defendants filed their motion for summary judgment on March 22, 2011 (Mot. Seq. 004), 63 days after the note of issue was filed, without first opposing Plaintiff's timely summary judgment motion. Later, on or about April 13, 2011, Defendants resubmitted the affirmation in support of their motion, with minor changes, and re-labeled it as their affirmation in opposition to Plaintiff's summary judgment motion. Another week later, on or about April 20, 2011, Defendants served an "amended notice of cross motion," in an attempt to complete their repackaging of their untimely summary judgment motion into a cross motion.

While Defendants' untimely motion was fatally defective and thus will not be considered, had they filed a cross motion on March 22, 2011, it may have proved acceptable if it essentially mirrored the issues set forth in Plaintiff's timely summary judgment motion. *Conklin v Triborough Bridge & Tunnel Auth.* (49 AD3d 320, 321 [1st Dept 2008]) ("We note that plaintiff's untimely cross motion was not improperly considered, since it sought relief on the same issues as were raised in defendants' timely motion"); *Lapin v Atlantic Realty Apts. Co.*, LLC, 48 Ad3d 337, 337 (1st Dept 2008) ("The property owner's marginally untimely cross motion for summary judgment was properly considered by the court because it raised nearly identical issues, inter alia, of lack of proof of defect and notice, as asserted in [defendant] Century's timely motion"); *Altschuler v Gramatan*, 27 AD3d 304, 305 (1st Dept 2006) ("Consideration of [defendant] Builtland's cross motion was not erroneous, even though it was served after the 120-day cutoff . . . [because it] was largely based on the same arguments raised in [co-defendant] Daffy's timely motion").

However, Defendants' "amended cross motion" requests dismissal of the entire complaint, including the causes of action for negligence and violation of Labor Law §§ 200 and

241, extending beyond the bounds of *Conklin,* and the other aforementioned cases. In addition, even if Defendants had properly submitted a cross motion, the court would have considered it only to the extent that it requested dismissal of the complaint's Labor Law § 240 (1) claim.

The Court of Appeals has taught that it is incorrect to suppose "that regardless of the facts every ladder injury leads ineluctably to liability under section 240 (1)." *Blake*, 1 NY3d at 292. However, in the instant action, just as in *Panek v County of Albany* (99 NY2d 452, 458 [2003]), "Plaintiff's allegation that the ladder 'gave way' or collapsed beneath him, causing him to fall, was uncontested."

> "Plaintiff was not required to show that the ladder was defective in some way as part of his prima facie case for summary judgment. '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' (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [(1st Dept) 2002])."

McCarthy v Turner Constr., Inc., 52 AD3d 333, 333-334 (1st Dept 2008).

Defendants argue, without supporting evidence, that Plaintiff's choice of a ladder was the sole proximate cause of his accident. To defeat summary judgment on this basis, a 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]). There is no evidence that plaintiff misused an adequate ladder or failed to use a readily available safety device which would have protected him from a fall (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010] [ironworker was not the sole proximate cause of his injuries where nothing indicated that he knew where to find safety devices or that he was told to use them]; *Cardenas v One State St., LLC*, 68 AD3d

436, 438 [1st Dept 2009] [worker was not the sole proximate cause of his injuries for failing to test electrical panel prior to applying force to the panel]; *cf. Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555, 556 [1st Dept 2009] [where defendant's store manager testified "that he saw plaintiff lean a closed ladder against the wall, unsecured, that he warned plaintiff that this was not safe, and that plaintiff replied that he knew what he was doing," such testimony raised "the factual issue of whether plaintiff misused an otherwise adequate ladder by leaning it, unsecured, against the wall, after which the ladder slipped as he was moving on top of it"]).

Here, Defendants speculate, but do not demonstrate, that a suitable ladder was available, based on Spagnuolo's testimony that Plaintiff's employer "probably" had an extension ladder. Further, Defendants speculate, but do not demonstrate, that Plaintiff knew of ladders stored in a locked tool shanty somewhere on the premises, knowledge of which Walsh denied (Walsh Tr at 46). Although Defendants claim that Plaintiff was "careless" in selecting a ladder belonging to another trade, because the ladder did not have the employer's initials on it, even assuming that the ladder was not the employer's, no evidence has been submitted indicating that it was in fact the custom and trade not to use another trade's ladder. Nor was any evidence was submitted to refute Plaintiff's testimony that he was never told not to use the ladders of other trades (Walsh Tr at 134), or, to dispute the testimony of Plaintiff's foreman Jamie Spagnulo (the basis for Defendants' sole proximate cause argument) that Spagnulo never told Plaintiff not to use that ladder (Spagnulo Tr at 11). Moreover, although Defendants' claim that the ladder was defective, because Plaintiff equivocally testified that it had no feet (he also testified that at the time he used it, he did not know if it had feet and was not exactly sure what the bottom looked like [Walsh at 97, 104]) and because it had rounded edges (he also testified that the rounded edges were either on the top or the bottom of the ladder [Walsh Tr at 94, 97]), assuming that defect, there is no

evidence indicating that Plaintiff knew that the ladder was, as alleged by Defendants, "decrepit" or "broken." In fact, Plaintiff testified that the ladder was "in good shape as far as being sturdy" (Walsh Tr at 93) and even though the bottom may or may not have been rounded, he was not sure if the ladder would rock or roll (Walsh Tr at 105) and therefore had no reason to believe that the ladder was defective. As Defendants have failed to demonstrate that there were adequate safety devices available, which Plaintiff knew were available and knew he was expected to use, but that instead, knowingly chose to use a defective ladder, Plaintiff's motion for summary judgment based on the violation of Labor Law § 240 (1) must be granted.

It is hereby

ORDERED that Plaintiff's motion for partial summary judgment in his favor on the issue of liability under Labor Law § 240 (1) is granted (Mot. Seq. 003), with the determination of the amount of damages to await trial; and it is further

ORDERED that Defendants' motion for summary judgment in their favor dismissing the complaint against them in its entirety is denied as untimely (Mot. Seq. 004); and it is further

ORDERED that the parties appear in Room 422 on October 24, 2011 at 10 am for trial and after meeting with the Judge, immediately commence jury selection.

DATED: August 22, 2011

ENTER:

J.S.C.
EMILY JANE GOODMAN