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SCANNED ON 9/26/2011

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JANE S. SOLOMON PART 55

Index Number : 108443/2009
SOTO, JOSE A.
vs
J. CREW INC.
Sequence Number : 005
DISMISS

INDEX NO. _____
MOTION DATE 6/27/11
MOTION SEQ. NO. _____

or _____

Answering Affidavits — Exhibits _____ | No(s). 1-3
Replying Affidavits _____ | No(s). 4-6
No(s). 7-8

Upon the foregoing papers, it is ordered that this motion is is decided by the annexed Memorandum decision and Order.

FILED

SEP 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/22/11

JANE S. SOLOMON, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
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JOSE A. SOTO,

Plaintiff,

-against-

J. CREW INC., J. CREW GROUP, INC. and THE MERCER I LLC.,

Defendants.

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Index No. 108443/2009
DECISION and ORDER

JANE S. SOLOMON, J.:

This is a personal injury action under the New York Labor Law (Labor Law). Plaintiff Jose A. Soto (Soto) sues defendants J. Crew Inc., J. Crew Group, Inc. (together, J. Crew), and The Mercer I LLC. (Mercer), for injuries sustained when he fell from an A-frame ladder. J. Crew moves to dismiss the complaint (Motion Sequence 005), and, separately, Mercer moves by order to show cause for summary judgment dismissing the complaint (Motion Sequence 006). Soto cross moves against each movant for summary judgment in his favor on the labor law § 240(1) claim.

FACTS

Soto was an employee of Whelan Cleaning Services (Whelan), a commercial cleaning company. J. Crew contracted with Whelan for cleaning services to its store, located at 99 Prince Street in lower Manhattan (the Store). Soto worked at the Store on a daily basis and was charged with general cleaning, mopping and dusting. On November 4, 2008, Soto climbed an A-frame

ladder, provided by J. Crew, to dust high shelves. The ladder tipped and Soto fell. His complaint asserted claims under Labor Law §§ 200 and 240(1), and for common law negligence. He has withdrawn the common law and § 200 claims.

Labor Law Section 240 (1) provides:

> All contractors and owners . . . 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 . . . 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.

The section protects against hazards "related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich v. Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). 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-Electric Co.*, 81 NY2d 494, 500 [1993]).

Defendants' arguments in their individual motions mirror one another. They argue that Soto was not engaged in an

protected activity covered by the Labor Law, so that § 240(1) does not apply to him. Specifically, they argue that a cleaner engaged in routine dusting should not be afforded the same protections as a construction worker or a cleaner hired to do a one-time specific job on a "building or structure." Soto opposes the motion, citing to *Broggy v. Rockefeller Group, Inc.*, 8 NY3d 675 (2007), which held that commercial window cleaning was protected under § 240(1). From this, he argues that all commercial cleaning is protected under the Labor Law.

Broggy was a window washer, specifically hired to clean the interior of the 8th floor windows of 75 Rockefeller Plaza. While working, he climbed on a desk to wash the top of a window, and fell. The Court of Appeals determined that he was engaged in a protected act, stating that cleaning is expressly afforded protection under section 240(1) "whether or not incidental to any other enumerated activity" (*Broggy*, 8 NY3d at 680); i.e. whether the cleaning was in connection with construction work of any sort. In doing so, it made reference to the difference between commercial cleaning, such as commercially hired window washers, and "routine, household" cleaning--cleaning the windows of a private apartment--which is not protected under the Labor Law. It explained that routine household cleaning is "not the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240" (Id., citing *Brown v. Christopher St.*

Owners Corp., 87 NY2d 938, 939 [1996]).

The cases cited by the parties on this issue involve window washers who were hired for specific, targeted cleaning operations. None involved workers who were on hand on a daily basis for *routine* commercial cleaning. In fact, the *Broggy* Court did not address this aspect, and thereby left open the issue of whether such routine commercial cleaning should be covered by the Labor Law, which is the crux of this decision.

Labor Law § 240(1) imposes strict liability on contractors and owners for injuries regardless of control or knowledge. To afford a routine commercial cleaner the protection of § 240(1) would grant this powerful protection to an entirely new class of individuals, greatly expanding the ambit of the statute. If this were the law, commercial tenants employing outside cleaning companies on a regular basis, and the property owners might be strictly liable to the contractor's employees under § 240(1). It cannot be said that the legislature intended this result, or that the *Broggy* decision stands for this proposition--that routine daily cleaning such as dusting, sweeping, mopping or general tidying up are "the kind of undertaking for which the Legislature sought to impose liability under Labor Law § 240" (*Brown*, 87 NY2d at 939). Accordingly, Soto was not engaged in a protected activity under Labor Law § 240(1).

In light of the foregoing, it hereby is

ORDERED that the plaintiff's cross motions for summary judgment in his favor on the Labor Law § 240(1) claim are denied; and it further is

ORDERED that the motions of the J. Crew defendants and The Mercer I, LLC. are granted, and the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: 9/22, 2011

FILED

ENTER: SEP 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.
JOAN S. SOLOMON