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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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SANTOS ZELAYA

Index No.: 21635/09

Plaintiff,

Motion Dated:
June 21, 2011

-against-

Cal. No.: 24

305 EAST 85TH STREET REALTY, LLC, ET AL.,

Defendants. m# 1

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The following papers numbered 1 to 16 read on this motion by plaintiff for summary judgment on the issue of liability pursuant to Labor Law §240 (1), and cross motion by defendant 305 East 85th Street Realty, LLC and 85th Street Builders, LLC, to dismiss the complaint pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1 - 5
Notice of Cross Motion - Affidavits - Exhibits.	6 - 9
Answering Affidavits - Exhibits	10 - 12
Reply Affidavits	13 - 16

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

Plaintiff in this negligence/labor law case seeks damages for personal injuries sustained on April 27, 2009, in a construction accident. It is alleged that, while performing ceiling framing work on a job site located at 305 East 85th Street (job site), plaintiff fell from the second rung (from the bottom) of a four-foot ladder. Plaintiff was employed by Yeats Contracting, Inc. (Yeats), as a carpenter, and his employer had been retained to renovate a "high end" residential building. The property on which the accident occurred is owned by 305 East 85th Street Realty, LLC (85th Street Realty). 305 East 85th Street Builders, LLC (85th Street Builders), was the construction manager/general contractor on the project. Plaintiff moves for summary judgment in his favor on his claims pursuant to Labor Law §240 (1). Defendants oppose the motion and cross move for summary judgment in their favor dismissing the complaint pursuant to CPLR3212. Plaintiff opposes defendants' cross motion.

Plaintiff's Motion

Briefly, plaintiff testified that on the day of the accident, he was working on framing. The work started on the fourth floor and as work on each floor was completed, plaintiff would move up to continue work on the next floor. Plaintiff would install metal for the purpose of framing. In order to do the work, plaintiff testified, he needed to use a ladder. Plaintiff always used the same ladder, which had been provided to plaintiff by his boss or foreman. At the end of each day, plaintiff would take the ladder back to the company's office on the first floor. The ladder was approximately four feet high and had four legs. To open the ladder, one would pull it open from the bottom. It had parts around the middle which connected the two sides. Plaintiff had changed the position of the ladder several times on the morning of the accident before the accident. He had climbed the ladder that day more than five times in the course of his work.

At the time of the accident, plaintiff was on (approximately) the second step from the bottom. He needed to install metal into the sides of the wall approximately 8 or 9 feet up. Plaintiff was wearing jeans, a T-shirt and work boots. At the time of the accident, he was reaching up with a screw gun in his right hand and the metal in his left hand. Both hands were extended above his head. Plaintiff had not yet begun to operate the screw gun when the ladder unexpectedly moved forward causing plaintiff to fall.

Plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability on the Labor Law § 240 (1) cause of action through his deposition testimony and affidavit, which demonstrated that the ladder on which he was working moved for no apparent reason, causing him to fall (*see Razzak v NHS Community Dev. Corp.*, 63 AD3d 708 [2009]; *Mingo v Lebedowicz*, 57 AD3d 491 [2008]; *Gilhooly v Dormitory Auth. of State of N.Y.*, 51 AD3d 719 [2008]; *Hanna v Gellman*, 29 AD3d 953 [2006]). In opposition, defendants failed to raise a triable issue of fact as to whether the plaintiff's conduct was the sole proximate cause of the accident (*see Argueta v Pomona Panorama Estates, Ltd.*, 39 A.D.3d 785 [2007]; *Chlap v 43rd St.-Second Ave. Corp.*, 18 AD3d 598 [2005]; *Wallace v Stonehenge Group*, 1 AD3d 589 [2003]; *compare Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]), or as to whether the failure to properly secure the ladder was not a substantial factor leading to the plaintiff's injuries (*see Guzman v Gumley-Haft, Inc.*, 274 AD2d 555 [2000]). Accordingly, the Court grants plaintiff's motion for summary judgment in his favor on the issue of liability pursuant to Labor Law §240 (1); and denies that branch of the defendants' motion which is for summary

judgment dismissing the Labor Law § 240 (1) cause of action.

Cross Motion by defendants

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; *Lombardi v Stout*, 80 NY2d 290 [1992]; *Chowdhury v Rodriguez*, 57 AD3d 121 [2008]). Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a work site and those involving the manner in which the work was performed (*see Chowdhury v Rodriguez*, 57 AD3d at 128; *Ortega v Puccia*, 57 AD3d 54 [2008]). Where a premises condition is at issue, a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice (*see Chowdhury v Rodriguez*, 57 AD3d at 128; *Ortega v Puccia*, 57 AD3d at 61; *Azad v 270 5th Realty Corp.*, 46 AD3d 728 [2007]). Where a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that she or he had the authority to supervise or control the performance of the work (see Ortega v Puccia, 57 AD3d at 61; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199 [2007]). Here, to the extent that plaintiff's common-law negligence and Labor Law § 200 causes of action are based on the defective condition or inadequacy of the ladder, defendants established its prima facie entitlement to judgment as a matter of law by demonstrating that the owner and construction manager did not have authority to supervise or control the performance of the work (*see McFadden v Lee*, 62 AD3d 966 [2009]; *Ortega v Puccia*, 57 AD3d at 63). In opposition, plaintiff failed to raise a triable issue of fact (*see Ortega v Puccia*, 57 AD3d at 63).

Finally, Labor Law § 241 (6) imposes a "*nondelegable* duty . . . upon owners and contractors 'to provide reasonable and adequate protection and safety to [construction workers]' " (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998]; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]; *Dickson v Fantis Foods*, 235 AD2d 452 [1997]). In order 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 an Industrial Code provision that is applicable given the circumstances of the accident, and sets forth a concrete standard of conduct rather than a mere reiteration of common-law principals (*D'Elia v City of New York*,

81 AD3d 682, 684 [2011]; *Misicki v Caradonna*, 12 NY3d 511 [2009]). Here, plaintiff alleges violations of 12 NYCRR 23-1.16; 23-1.17; 23-1.21; 23-1.7 (d); 23-1.7(e); 23-1.8; 23-1.15; 23-1.31; 23-1.32; 23-2.8 and 23-2.5, in the verified bill of particulars and verified complaint. As noted below, these Industrial Code provisions are either too general or not applicable to the facts at hand (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Robinson v County of Nassau*, 84 AD3d 919 [2011]).

Defendants established, prima facie, that the regulations set forth at 12 NYCRR 23-1.15, 23-1.16 and 23-1.21, which set standards for safety railings, safety belts and ladders, respectively, are inapplicable here because the plaintiff was not provided with any such devices (*see Smith v Cari, LLC*, 50 AD3d 879 [2008]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2008]; *Juchniewicz v Merex Food Corp.*, 46 AD3d 623 [2007]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336 [2006]; *Norton v Park Plaza Owners Corp.*, 263 AD2d 531 [1999]).

12 NYCRR 23-1.17 sets forth requirements for life nets. This section is inapplicable because there is no evidence that plaintiff was provided with life nets (*see Forscher v Jucca Co.*, 63 AD3d 996 [2009]; *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336 [2006]).

Plaintiff also alleges violation of 23-1.21(b). These regulations set forth the standards applicable to the installation and use of ladders and ladder ways. There is nothing in the record indicating that the ladder in question violated this provision. Specifically, there is no evidence indicating that the ladder was insufficient in strength, covered with opaque protection, had a broken part, had insecure joints, had worn wooden rungs or flaws in the material. Furthermore, the ladder was not a portable ladder used as a regular means of access and did not have bricks or boxes as ladder footings. Additionally, the ladder in the instant case was not a leaning ladder, did not have wooden rungs, was not a spliced ladder, a single pole ladder and was not placed in a door opening. Finally, there is nothing in the record to demonstrate that the ladder used by plaintiff on a daily basis for four to five months prior to the accident, did not have proper locking-type spreader. To the contrary, plaintiff testified that, based upon his visual inspection of the ladder on the morning of the accident, there were no problems or defects with the ladder.

12 NYCRR 23-1.21 (c) and (d) are inapplicable as plaintiff was not using a cleat type ladder or an extension or sectional ladder. 23-1.21 (e) was not violated as the ladder at issue was under 10 feet (4 feet here) and was braced. Plaintiff also

testified that the subject ladder was used on firm level footings.

Inasmuch as there were no ladderways involved, § 23-1.21(f) does not apply.

Since there is no evidence that plaintiff fell because of a slippery condition, section 23-1.7(d) does not support his claim. To the extent that the tripping regulations address hazards in passageways, walkways or thoroughfares (§ 23-1.7[e][1]), and the subject accident was not caused from dirt or debris on the floor, this section is likewise inapplicable.

12 NYCRR 23-1.8 pertains to personal protective equipment, specifically eye protection, respirators, protective apparel, and cleanliness of personal protective equipment. Here, there are no facts indicating that plaintiff required any of the protective equipment noted, nor did plaintiff's injury (fractured wrist) involve any of the body parts that the equipment in this section was designed to protect.

12 NYCRR §23-1.30 which pertains to approval of materials and devices, and §23-1.32 which pertain to warning signs are too general to serve as a predicate for Labor Law §241 (6) (*see generally Silvas v Bridgeview Investors, LLC*, 79 AD3d 727 [2010]).

Finally, defendants assert and plaintiff does not dispute that the following regulations set forth in the bill of particulars are not applicable here: § 23-2.5 [shafts], § 23-2.8 [painting]. Therefore, these provisions are dismissed as a predicate for Labor Law §241 (6).

Conclusion

Plaintiff's motion for summary judgment on the issue of liability pursuant to Labor Law § 240(1)is granted, and an assessment of damages shall be held at the time the case is called for trial.

The branch of the cross motion for summary judgment dismissing plaintiff's claims pursuant to Labor Law § 240(1) is denied.

The branches of the cross motion for summary judgment dismissing plaintiff's common law negligence claim as well as the claims pursuant to Labor Law §§ 200 and 241(6) are granted.

Date: July 22, 2011

AUGUSTUS C. AGATE, J.S.C.

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