Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

RICHARD PROBST and JANET PROBST,

Plaintiffs,

-against-

11 WEST 42 REALTY INVESTORS, L.L.C. and TISHMAN SPEYER PROPERTIES, L.P., and NTT SERVICES, LLC,

Defendants.

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11 WEST 42 REALTY INVESTORS, L.L.C. and TISHMAN SPEYER PROPERTIES, L.P.,

Third-party Plaintiffs,

-against-

NTT SERVICES, LLC

Third-party Defendant.

Index No: 18550/09

Motion Date: 12/14/11

Motion Cal. No: 25, 26

Motion Seq. No.: 2, 3

Motions Sequence Nos. 2 & 3 are combined for disposition. The following papers numbered 1 to 21 read on this motion by plaintiff for summary judgment on his Labor Law §240(1) claim; and defendants' separate motion for summary judgment dismissing all causes of action asserted in the complaint

		PAPERS NUMBERED
Mot. Seq.#2	Notice of Motion-Affidavits-Exhibits	1 - 4
	Answering Affidavits-Exhibits.....	5 - 6
	Replying Affidavits.....	7 - 9
Mot. Seq.#3	Notice of Motion-Affidavits-Exhibits	10 - 13
	Answering Affidavits-Exhibits.....	14 - 17
	Replying Affidavits.....	18
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Upon the foregoing papers it is ordered that these motions are determined as follows.

This is an action to recover for personal injuries plaintiff Richard Probst (hereinafter the plaintiff), sustained on January 30, 2007 in the course of his employment as a window washer at 11 West 42nd St. in New York City (hereinafter the building) owned by the defendant, 11 West 42nd Realty Investors, LLC. The defendant Tishman Speyer Properties, L.P., the managing agent for the owner, contracted with third-party defendant, NTT Services LLC (hereinafter NTT) to perform window washing serves at the building. NTT in turn contracted with Pritchard Industries, Inc. (hereinafter Pritchard) to perform the work. Plaintiff was the employee of Pritchard (also referred to by the parties as Combined Building Services).

Plaintiff, and his wife suing derivatively, commenced this action against the defendants alleging violations of Labor Law §§ 240(1), 241(6), 200 and 202 as well as for common-law negligence.

The plaintiff now moves for summary judgment in his favor on his Labor Law § 240(1) claim. The defendants oppose and separately move for summary judgment dismissing all causes of action asserted in the complaint on the grounds that plaintiff cannot recover as against the defendants pursuant to (a) Labor Law § 200 or common law negligence because the defendants did not have notice of the condition which caused the injury; nor (b) pursuant to Labor Law § 202 since plaintiff has failed to plead the violation of a concrete provision of the Industrial Code which is applicable to the facts of this case; and (c) Labor Law § 241(6) does not apply to this case and plaintiff has failed to plead the violation of a concrete provision of the Industrial Code applicable to the facts of this case. Defendants also assert that plaintiff's Labor Law § 240(1) claim should be dismissed since it does not apply to the facts of this case, that any alleged violation of the statute was not the proximate cause of the accident and that the sole proximate cause of the plaintiff's fall was plaintiff's failure to use available safety devices.

In support of their respective motions the parties submitted the deposition testimony of the plaintiff and Rigoberto Salizar, (hereinafter Rigo). Plaintiff also submitted an Incident Report dated January 30, 2007 prepared by a Security personnel at the building and an Internal Worker's Compensation Incident Report. Defendants submitted the affidavits of Rigo and John Schonmann (hereinafter John), the Vice President of plaintiff's employer.

On January 30, 2007, John assigned the plaintiff with two co-workers, Rigo and Carlos, to clean the windows on the 15th floor at the subject building. Plaintiff was to clean the inside and his two co-workers were to clean the outside of the windows. Plaintiff testified that "the engineer", a person at the building, gave them access to the office on the 15th floor. The windows were approximately 6-7 feet tall and began about three feet from the floor. There was a convector measuring about 3 feet tall, 3 feet wide and 12 inches deep directly under each window. Plaintiff stated that he asked Rigo and Carlos how to access the upper portion of the window and they told him to stand on the convector. Plaintiff did not ask for a ladder, a longer handle or any other equipment and did not express any concerns about standing on the convector. Plaintiff stated that during his one year employment at Pritchard he had stood on convectors numerous times to clean windows. Plaintiff also testified that Pritchard never provided a ladder to perform "this type of work", but he did use a ladder to wash windows in a lobby.

Plaintiff testified that their general procedure was that first Rigo climbed out the window onto the window ledge, attached his safety belts, and then plaintiff handed him the wand which was wet with sappy water, and the squeegee and then closed the window. Plaintiff would then proceed to wash the inside surface by climbing on the convector. He testified that before climbing onto a convector he checked each one to make sure it was stable and firm. He stated that he had completed cleaning four windows by standing on the convector prior to his accident.

Plaintiff testified that at the fifth window, and after Rigo went out the fifth window, plaintiff placed his wet wand on the window sill, his squeegee into his holster and attempted to climb up onto the convector. Plaintiff claims that while he was trying to climb onto the convector he slipped on soapy water which he believes came from the dripping wand he passed to Rigo, and as he fell backward his hand struck and broke the top of a glass table standing behind him, resulting in the injury to his hand.

Plaintiff testified that John was his supervisor and the only one who gave him directions on what to do. Plaintiff also testified that at the time of his employment Pritchard provided all the equipment for doing his job and he brought his equipment to each job. On the day in question he had a bucket, wands and squeegees, 18 and 22 inches long, and the belts for his co-workers which he picked up at Pritchard's office that morning.

Rigo testified that he did not see the plaintiff's accident because he was out on the ledge. When plaintiff failed to respond

to his call to open the window, he opened it himself, came in and found plaintiff standing next to the broken table holding his hand. In his affidavit, he stated, among other things, that since he's been an employee of Pritchard, John advised him and all window washers not to stand on furniture.

John asserted in his affidavit, among other things, that he advised all his window washers to not stand on furniture and to use ladders, if necessary. He also stated that Pritchard had scaffolds available, but it is not necessary fo interior work.

The branch of defendants' motion to dismiss plaintiff's claim based upon violation of Labor Law § 200 is granted.

Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (see Rizzuto v. L.A. Wenger Contr. Co., 91 NY2d 343, 352 [1998]; Kim v. Herbert Constr. Co., 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 may be imposed on those who exercise control or supervision over the means and methods that plaintiff employs in his work (see Rizzuto v L.A. Wenger Contr. Co., supra at 352; Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]; Cabrera v. Revere Condominium, 91 AD3d 695 [2012]), or who have actual or constructive notice of an unsafe condition that causes an accident (see Gray v. City of New York, supra at 679-680 [2011]). General supervisory authority to oversee the progress of the work is insufficient to impose liability (see Ortega v. Puccia, 57 AD3d 54, 61 [2008]). The defendants established, prima facie, entitlement to dismissal of this cause of action submitting the deposition testimony of the plaintiff which demonstrated that the defendants neither directed nor controlled the method or manner in which the plaintiff performed his work (see Amaxes v. Newmark & Co. Real Estate, 15 AD3d 321 [2005]), nor had actual or constructive knowledge of an unsafe condition (see Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]; Kim v. Herbert Constr. Co., supra). In opposition, plaintiff failed to raise a triable issue of fact.

The branch of the defendants' motion to dismiss the plaintiff's claim based upon violation of Labor Law § 241(6) is granted.

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (see Ross v.

Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 502-505 [1993]). It is undisputed that the plaintiff was engaged in washing windows and that there was no construction, demolition or excavation at the building. Therefore, the plaintiff does not fall within the class of persons protected by Labor Law § 241(6) as that statute does not apply to claims arising out of routine maintenance that is not connected to construction, demolition or excavation of a building or structure (see Nagel v. D & R Realty Corp., 99 NY2d 98 [2002]; Jock v. Fein, 80 NY2d 965, 968 [1992]; Retamal v. Miriam Osborne Memorial Home Ass'n, 256 AD2d 506, 507 [1998]). In opposition, plaintiff has failed to raise a triable issue. Contrary to plaintiff's claim the plaintiff's activities do not constitute "construction" even as the term is defined in the Industrial Code, which only includes cleaning of "...windows of any building or other structure under construction..." (12 NYCRR 23-1.4 [b][13]).

With respect to the branch of defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) and Labor Law § 202 causes of action, and plaintiff's motion for summary judgment in his favor on his Labor Law § 240(1) claim, they are denied.

"To recover under Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident" (Marin v. Levin Props., LP, 28 AD3d 526 [2006], citing Blake v. Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287[2003]). However, "[t]he extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (Nieves v. Five Boro A.C. & Refrig. Corp., 93 NY2d 914, 915-916 [1999], quoting Ross v. Curtis-Palmer Hydro-Elec. Co., supra at 501). "Where an injury results from a separate hazard wholly unrelated to the risk which brought about the need for the safety device in the first instance, no section 240(1) liability exists" (Nieves v. Five Boro A.C. & Refrig. Corp., supra at 915, citing Melber v. 6333 Main St., 91 NY2d 759, 763-764 [1998]; see Cohen v. Memorial Sloan-Kettering Cancer Center, 11 NY3d 823 [2008]). A defendant cannot be held liable if the plaintiff's actions were the sole proximate cause of the accident (see Robinson v. East Med. Ctr., LP, 6 NY3d 550, 554 [2006]; Cahill v. Triborough Bridge & Tunnel Auth., 4 NY3d 35 [2004]; Blake v. Neighborhood Hous. Servs. of N.Y. City, supra; Plass v. Solotoff, 283 AD2d 474 [2001]).

Here, the parties' submissions in support of their respective motions on the Labor Law § 240(1) cause of action

reveal the existence of numerous issues of fact necessary to determine whether the statute was violated and whether any alleged violation was a proximate cause of the plaintiff's fall (see Melber v. 6333 Main St., supra; Ramsey v. Leon D. DeMatteis Const. Corp., 79 AD3d 720 [2010]; Amaxes v. Newmark & Co. Real Estate, Inc., supra; Tylman v. School Constr. Auth., 3 AD3d 488 [2004]).

The defendants have also failed to establish, prima facie that the sole proximate cause of the accident was the plaintiff's conduct. The plaintiff testified that when he began working for Pritchard, Pritchard provided all of his equipment to perform his work which he brought to the location of each job and that he used ladders when washing lobby windows. However, neither plaintiff's testimony on nor any other evidence presented by defendants explain what equipment was available to plaintiff, Pritchard's procedures for obtaining equipment or whether a ladder or any other device was "readily available" and plaintiff chose not to use it (see Montgomery v. Fed. Express Corp., 4 NY3d 805, 806 [2005]; Garlow v. Chappaqua Cent. School Dist., 38 AD3d 712 [2007]).

The branch of the defendants' motion to dismiss the plaintiff's cause of action based upon violation of Labor Law § 202 is also denied.

In support of this branch of their motion defendants assert that dismissal is warranted since the plaintiff only alleged a violation 12 NYCRR 23-1.21 of the Industrial Code in his Bill of Particulars which alleged violation is not applicable to the facts of this case.

Labor Law § 202, entitled "Protection of the public and of persons engaged at window cleaning and cleaning of exterior surfaces of buildings" imposes a duty upon the owner, lessee, agent and manager of every public building and every contractor involved to provide such safe means for the cleaning of the windows and of exterior surfaces of such building as may be required and approved by the industrial board of appeals (see Williamson v. 16 West 57th St. Co., 256 AD2d 507[1998]; Berrios v. 1115 Fifth Ave. Corp., 160 AD2d 655 [1990];). The rules promulgated by the industrial board are set forth contained in the Industrial Code. As with claims based upon Labor Law § 241(6), comparative negligence principles apply to claims based upon violations of Labor Law § 202 (see Bauer v. Female Academy of Sacred Heart, 97 NY2d 445, 452 [2002]).

Although plaintiff's Bill of Particulars only alleged the violation of 12 NYCRR 23-1.21, defendant submitted a Supplemental Bill of Particulars in opposition to defendants' motion, to which defendants did not object, alleging the additional violations of 12 NYCRR 23-1.7(d) and 12 NYCRR 21.5 and particularly 12 NYCRR 21.5(e).

Setion 12 NYCRR 21.1[a] of the Industrial Code specifically provides that the provisions in Part 21, i.e 12 NYCRR 21.0 et.seq., are the subject of Labor Law § 202. Part 23 of the Industrial Code is applicable only to persons employed in construction, demolition and excavation operations (see 12 NYCRR 23-1.3). Thus, 12 NYCRR 23-1.7(d) and 12 NYCRR 23-1.21 are inapplicable to the facts of this case and insufficient to support a cause of action based upon alleged violation of Labor Law § 202. However, allegations of a violation of 12 NYCRR 21.5 contained in plaintiff's Supplemental Bill of Particulars is sufficient to support plaintiff's Labor Law § 202 claim.

Dated: February 29, 2012
D#47

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J.S.C.