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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Index Number : 113263/2009
LI, TING ZHOU
vs.
CHUN KIEN REALTY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 4/4/12

_____, J.S.C.
HON. JUDITH J. GISCHE

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: Part 10

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TING ZHOU LI, as Administrator of the Goods, Chattels and Credits of YUN KUI JIANG a/k/a YUNKUI JIANG deceased, and for the benefit of the distributees,

Plaintiffs,

-against-

CHUN KIEN REALTY CORP., US PACIFIC ASSOCIATES LLC, doing business as US PACIFIC HOTEL and US PACIFIC HOTEL Individually,

Defendants.

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Decision/Order
Index No.: 113263/09
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def's n/m [3212] w/ WAS affirm, exhs.	1
Plf's n/m [3212] & opp. w/ AED affirm, HQL affid, exhs.	2
Def's opp & reply w/ WAS affirm.	3

Hon. Judith J. Gische, J.S.C.:

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action arising from a work place accident brought by Ting Zhou Li, as Administrator of the Goods, Chattels and Credits of Yun Kui Jiang a/k/a Yunkui Jiang deceased ("decedent"), and for the benefit of the distributees ("Ziang Estate" or "plaintiff"). Defendants are Chun Kien Realty Corp. ("Chun") and US Pacific Associates, LLC, doing business as US Pacific Hotel and US Pacific Hotel Individually ("US Pacific") (collectively "defendants"). Plaintiffs claim that decedent's injuries were proximately caused by defendants' negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Plaintiff is seeking damages for, among other things, decedent's conscious pain and suffering.

Defendant has moved for summary judgment dismissing the complaint. Plaintiffs have cross-moved for summary judgment on their Labor Law §§ 240(1) and 241(6) claims and they also oppose the defendants motion. Since issue has been joined and these motions were timely brought after plaintiff filed his note of issue, they will be considered on the merits. CPLR § 3212, Brill v. City of New York, 2 N.Y.3d 648 (2004).

Summary of the Facts and Arguments

The following facts are established or unrefuted:

Decedent passed away as a result of injuries sustained on October 19, 2007, at 106 Bowery Street, New York County. The injuries were sustained when he fell from a ladder during the course of his employment with non-party New York Store Design, Inc ("Design"), a storefront sign company. Chun owned a building at 106 Bowery in Manhattan, the top three floors of which it leased to defendant US Pacific. US Pacific operated a hotel. The hotel hired Design, in July 2007, to install an illuminated sign on the hotel's facade, which Design warranted for one-year. In October 2007, the sign stopped working properly and the Design dispatched decedent and a co-worker, Heng Qiao Li ("Heng"), to repair it.

US Pacific claims that none of its employees instructed the two workers sent by the sign company on how to perform their work. US Pacific produced Xue Ren Li ("Xue") for an examination before trial ("EBT"). Xue worked at the hotel in 2007 and stated that his job description was to "help them (US Pacific) purchase stuff." Xue testified that the sign had stopped lighting up, he but did not know why it was not working. Xue further stated that decedent and Heng were there to just change a light bulb, but upon further examination, admitted that he was not familiar with what they actually did that day. Although Xue saw decedent and Heng setting up the ladder, he left to make purchases and did not return

until after the accident had ocurred. Xue believed that the ladder seemed to be in its original position at the time he returned to 106 Bowery.

Chun offered the EBT of David Ho ("David"). David is the President of Chun and first saw the sign at the hotel sometime before the accident. David claims Chun had nothing to do with the purchase, installation or maintenance work for the sign. David claims that he had no knowledge that the sign stopped illuminating or that someone had called the sign company to perform maintenance. Steven Ho, an owner of AAA Trading Corporation (ground floor tenant) called David to inform him of the accident.

The wife of decedent, Yue Xin Chen, and plaintiff Ting Zhou Li testified at her deposition that the decedent had fallen because he was fixing the sign and fell. She, however, had no personal knowledge of the circumstances of the accident.

Plaintiff, in opposition, offers the affidavit of Heng, the decedent's co-worker, who describes the work done that day, and the accident. Heng's sworn statement is based upon his personal observations. He states as follows:

> "¶5. We went to 104-106 Bowery that day to do repair work on a broken sign for the US Pacific Hotel.
>
> ¶6. The sign was located adjacent to the second floor of the building over 20 feet from the ground. In order to reach the sign to do our repair work we needed to use an extension ladder.
>
> ¶7. As we started to work, Mr. Jiang climbed the ladder first and I followed on the same ladder behind him. This was necessary to do our work.
>
> ¶8. We removed the cover of the sign and started our repair work.
>
> ¶9. Mr. Jiang examined the sign with me and we determined that the electrical components of the sign, including the

ballasts which regulate the amount of electricity through the bulbs were blown out and needed replacing and repair.

¶10. In order to repair the sign all of the wiring had to be disconnected and the electrical boxes and ballasts had to be removed, replaced and then rewired. This was much more significant and complex than changing a light bulb.

¶11. While Mr. Jiang was in the process of repairing the sign as described above, the ladder shifted and as a result Mr. Jiang lost his balance and fell.

¶12. He fell approximately 20 feet and hit his head on the fire hydrant that was on the curb below.

¶13. We were not provided with any safety devices to do our work. We were not provided with any safety helmets, scaffolds and/or safety harnesses.

¶14. The ladder was unsecured and there was no one available to hold the ladder."

(Pltf's Opp, Exh. A, Heng Affid.)

Defendants claim they are entitled to summary judgment dismissing plaintiff's Labor Law § 240 (1) and 241(6) claims because the fall occurred during a routine maintenance call, which is not protected work under the labor laws. Defendants further argue that plaintiffs' Labor Law § 241 (6) claims must be dismissed because plaintiff has not plead the specific Industrial Code provisions that have allegedly been violated. In addition, defendants claim that plaintiff is not entitled to any damages for conscious pain and suffering, because decedent was never conscious between the time he fell and he later died.

Plaintiffs deny that the work done was routine maintenance. Instead they argue that it was repair work, which is protected work under the Labor Laws. Plaintiffs claim that decedent was in the act of replacing and repairing ballasts, in addition to disconnecting and

reconnecting wires when he fell. They also argue that the there are Industrial Code provisions, specifically plead, which are directly applicable to the facts of this case, especially 12 NYCRR §§ 23.1.21 (Ladders and Ladderways). Plaintiffs also argue that defendants have not shown that decedent did not suffer pain and suffering, sufficient to defeat that claim.

Plaintiff has not opposed defendants motion seeking summary judgment on the Labor Law § 200 (common law negligence) claim. It is, therefore, granted. Gary v Flair Beverage Corp., 60 AD3d 413, 413 (1st Dept 2009).

Discussion

In deciding whether a movant is entitled to the grant of summary judgment in its favor, the court considers whether it has tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Zuckerman v. City of New York , 49 N.Y. 2d 557, 562 (1980). If met, the burden shifts to the opponent, who must then demonstrate the existence of a triable issue of fact in order to defeat the motion. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, *supra*. When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. *See:* Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept. 2003). Since each party has moved for summary judgment in their favor, they each bear the burden of establishing relief on their respective motions.

Labor Law § 240 (1)

Labor Law § 240(1) imposes a non-delegable duty upon the owner and contractor to supply necessary security devices for workers at an elevation, to protect them from

falling. Bland v. Manocherian, 66 N.Y.2d 452, 458-459 (1985). 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-Elec. Co., 81 NY2d 494, 500 (1993). Therefore, a violation of this duty results in absolute liability where the violation was the proximate cause of the accident. Meade v. Rock-McGraw, Inc., 307 A.D.2d 156 (1st Dept. 2003).

The crux of the parties' dispute is whether at the time of the accident decedent was performing routine maintenance, as defendants contend, or repair work, as plaintiffs contend. Routine maintenance is not protected work under the labor laws, while repair work is protected.

Notwithstanding each parties' characterization of the work done, the only admissible evidence of what actually occurred is contained in the affidavit of decedent's co-worker, Mr. Heng. He was the only person who had personal knowledge of the actual work done. None of defendants' witnesses, including Xue, knew the actual scope of the work. In describing the nature of the work done, Heng stated:

> "Mr. Jiang examined the sign with me and we determined that the electrical components of the sign, including the ballasts which regulate the amount of electricity through the bulbs were blown out and needed replacing and repair. In order to repair the sign all of the wiring had to be disconnected and the electrical boxes and ballasts had to be removed, replaced and then rewired. This was much more significant and complex than changing a light bulb." (Heng affd. ¶¶ 9, 10)."

In Picclone v. 1165 Park Avenue (285 AD2d 357 [1st dept. 1999]) the court found that there was liability under the labor laws, as a matter of law, when

> "Plaintiff fell and was injured when a ladder on which he

> was standing while repairing a fluorescent light fixture collapsed. The repair work consisted of replacing the ballast and sockets, discontenting the wires, stripping and reconnecting them. Such repairs, which entalled more that merely changing a lightbulb constituted 'repairs' within the meaning of Labor Law § 240(1)..."

Likewise in Rios v. WVF-Paramount 545 Property, LLP, 36 A.D.3d 511 (1st Dept. 2007) the court found that changing the wiring for lighting was a covered activity under the labor laws.

These cases are factually different from Monaghan v. 540 Investment Land Compnay LLC (66 AD3d 605 [1st dept. 2009]) where the same court found that a limited task of the regular replacement of ballasts in fluorescent fixtures was routine maintenance. In distinguishing Piccione, the court in Monaghan held that the plaintiff therein "routinely replaced the ballasts to the light fixtures, drawing on the building's supply of ballasts kept for those purposes."

At bar the undisputed facts establish that the work done on the lighted sign was not routine maintenance. It was a onetime call, made during the warranty period, made after the sign was installed. The work done was in the nature of a repair and replacement as described in Piccione. Unlike Monaghan, the ballasts were not being replaced in the regular course of maintaining the sign, they were replaced because there was a reported problem with their operation at a time when the sign was still warranted to be operating correctly. The court, therefore holds, that on the undisputed facts, the work done was in the nature of repair work that is covered under the labor laws.

Having determined the work to be covered, the court otherwise determines that the plaintiff has established a *prima facie* case of liability under Labor Law § 240(1). The

improper placement of a ladder and the failure to secure it are violations of Labor Law § 240 (1). Carlos v. W.H.P. 19 LLC., 280 A.D.2d 419 (1st Dept. 2001). Here, decedent was "injured in an elevation-related accident that was not prevented by any safety device, and he was engaged in repair work within the ambit of that statute's protection. 'It is well settled that the failure to secure a ladder to ensure that it remains stable and erect while the [decedent] was working on it constitutes a violation of Labor Law § 240(1) as a matter of law.' " Camacho v. 101 Ellwood Tenants Corp., 289 A.D.2d 102 (1st Dept. 2001) *citing* MacNair v. Salamon, 199 A.D.2d 170, 171(1st Dept. 1993).

Although defendants argue the ladder was not defective, this does not present a a triable issue of fact that defeats plaintiff's motion. 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. Potter v. NYC Partnership Housing Development Fund Co., Inc., 13 A.D.3d 83 (1st Dept. 2004). Plaintiff has established that decedent was provided with a ladder that did not allow him to safely perform his job, and that even if the ladder was not defective, he was not provided with adequate safety devices to prevent his fall. Nor is it a defense that safety devices may have been available somewhere on the job site, or that plaintiff may have ignored the safety instructions he may have been given prior to the date of his accident (Morrison v City of New York, 306 A.D.2d 86 [1st Dept 2003]), nor can defendants point to evidence of the record that decedent explicitly refused to use adequate safety devices to prevent his fall (Kosavick v. Tishman Const. Corp. of New York, 50 A.D.3d 287 [1st Dept. 2008]).

Accordingly, plaintiff's cross-motion for summary judgment on his Labor Law 240 (1) claims on this issue of liability is granted and defendants' motion for summary judgment

on that claim is denied.

Labor Law § 241 (6)

Labor Law § 241(6) of the Labor Law imposes "a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct their construction, demolition or excavation operations" in a manner that provides for the reasonable and adequate protection of persons working at the site. Rizzuto v. L.A. Wenger Contracting Co., Inc., 91 N.Y.2d 343, 350 (1998). Supervision of the work, control of the work site or actual or constructive notice of a violation of the Industrial Code is not necessary to impose vicarious liability against owners and general contractors, so long as someone in the construction chain was negligent. Rizzuto v. L.A. Wenger Contracting Co., Inc., supra; DeStefano v. Amtad New York, Inc., 269 A.D.2d 229 (1st Dept. 2000). To support a cause of action, the plaintiff must plead a concrete specification of the Industrial Code, that it was violated, and that the violation was a proximate cause of his injuries. Rizzuto v. L.A. Wenger, *supra*.

The question of whether the plaintiff has alleged a concrete specification of the Industrial Code, and whether the condition alleged is within the scope of the Industrial Code regulation, usually presents a legal issue for the court to decide. Messina v. City of New York, 300 A.D.2d 121 (1st Dept 2002). Defendants argue that plaintiff failed to cite specific Industrial Code sub-provisions under section 23-1.21 in his Bill of Particulars, and that on that basis alone his complaint should be dismissed. The court disagrees. Section 23-1.21 is a concrete specification that supports a cause of action under Labor Law § 241 (6) and plaintiff's bill of particulars clearly sets forth his claims. *See* Kun Yong Ke v. Oversea Chinese Mission, Inc., 49 A.D.3d 508 (2nd Dept. 2008). Therefore, plaintiff has

adequately satisfied the threshold pleading requirements of a Labor Law § 241 (6) cause of action. Padilla v. Frances Schervier, 303 A.D.2d 194 (1st Dept. 2003).

In his cross motion for summary judgment, plaintiff addresses the individual sub-section he claims supports his Industrial Code violation claims. Plaintiff relies on 12 N.Y.C.R.R. §23-1.4(b) to establish that the "repair" work performed by decedent is covered under Labor Law § 241(6). Section 23-1.21 (b) (4) (iv) provides that:

> "When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 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 N.Y.C.R.R § 23-1.21. (Ladders and Ladderways)

The court finds that this regulation is applicable to the facts of this case, and therefore serves as the predicate basis for plaintiff's Labor Law § 241(6) claim.

In Rizzuto the Court of Appeals stated that:

> "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 . . . An owner or general contractor may, of course, raise any valid defense to the imposition of vicarious liability under section 241 (6), including contributory and comparative negligence" (Rizzuto, 91 N.Y.2d at 350 [internal citations omitted]).

Here, Plaintiff has identified a specific Industrial Code provision (12 N.Y.C.R.R § 23-1.21) and asserts facts that establish a violation of this section of the Industrial Code. The

defendants contention that decedent was the cause of his accident, because he and Heng misused the ladder by recklessly going up the same ladder together, instead of one of them using the ladder to perform the work and one of them holding the ladder, raises an issue of comparative fault, that may be addressed at trial. (See: CPLR § 1411)

Therefore, defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment are denied as applied to Labor Law § 241(6).

Labor Law § 200

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., *supra*. As plaintiff has failed to oppose or otherwise move on this section of the Labor Law, defendants' motion is, therefore, granted, and the section 200 (common law negligence) claims against the defendants is deemed abandoned and is hereby severed and dismissed. Gary v. Flair Beverage Corp., 60 AD3d 413, 413 (1st Dept 2009).

Conscious Pain and Suffering

It is black letter law that if there is no proof of consciousness following an accident, there can be no recovery for conscious pain and suffering. Cummins v. County of Onondaga, 84 NY2d 322 (1994). Ferguson v. City of New York, 73 AD3d 649 (1st dept. 2010). Defendants rely on the verified Bill of Particulars in which plaintiffs concede that decedent lost consciousness following the accident. A verified Bill of Particulars has the same evidentiary weight as a sworn affidavit. CPLR §§ 105, 3020. See also: McKinneys Practice Commentary 2 §3020. The assertion in the Bill of Particulars satisfies defendants' burden of *prima facie* proof on this point. In opposition, plaintiffs have failed to come forward with any evidence whatsoever to establish that decedent was conscious for any

period of time following the accident that would serve as the predicate for pain and suffering. (Public Adm'r, Kings County v. U.S. Fleet Leasing of New York, Inc., 159 A.D.2d 331, 333 [1 Dept. 1990], Cummins v. County of Onondaga, 84 N.Y.2d 322 [1994], *aff'a*, 198 A.D.2d 875 [4th Dept. 1993]).

Accordingly, the portion of the defendant's motion for summary judgment dismissing the damages sought for pain and suffering is granted.

Conclusion

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's cross-motion for summary judgment on his Labor Law § 240 (1) is granted and the defendants motion on that claim is denied. The issue of damages has to be tried; and it is further

ORDERED that the motion and cross-motion for summary judgment on plaintiffs Labor Law §241(6) claim are both denied as there are factual disputes that must be decided at trial; and it is further

ORDERED that defendants motion for summary judgment dismissing plaintiff's Labor Law § 200 (common law negligence) claims is granted and severed; and it is further

ORDERED defendants motion for summary judgment on plaintiff's consclous pain and suffering claim is granted; and it is further

ORDERED that this case is ready to be tried. Plaintiff shall serve a copy of this decision/order on the office of Trial Support so that the case can be scheduled; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 4, 2012

So Ordered:

Hon. Judith J. Gische, JSC