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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Roman v 360 Bldrs., LLC</b>                                                                                                                                                                                                   |
| 2012 NY Slip Op 32740(U)                                                                                                                                                                                                         |
| November 5, 2012                                                                                                                                                                                                                 |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 103071/09                                                                                                                                                                                                         |
| Judge: Cynthia S. Kern                                                                                                                                                                                                           |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: \_\_\_\_\_  
Justice

PART \_\_\_\_\_

Index Number : 103071/2009  
ROMAN, JOSE  
vs.  
360 BUILDERS  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

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NOV - 7 2012

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

is decided in accordance with the annexed decision.

FILED

NOV 08 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/5/12

\_\_\_\_\_, 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

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 55

-----X  
JOSE ROMAN,

Plaintiff,

Index No. 103071/09

-against-

DECISION/ORDER

360 BUILDERS, LLC, RAL DEVELOPMENT  
SERVICES, LLC and 360 BROOKLYN  
INVESTORS, LLC,

Defendants.

-----X  
360 BUILDERS, LLC, RAL DEVELOPMENT  
SERVICES, LLC and 360 BROOKLYN  
INVESTORS, LLC,

**FILED**

NOV 08 2012

Third-Party Plaintiffs,

**NEW YORK  
COUNTY CLERK'S OFFICE**

-against-

NEWMARK CONSTRUCTION SERVICES, LLC  
and GATEWAY ACOUSTIC CORPORATION,

Third-Party Defendants.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

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

| Papers                                       | Numbered |
|----------------------------------------------|----------|
| Notice of Motion and Affidavits Annexed..... | _____    |
| Cross-Motion and Affidavits Annexed .....    | _____    |
| Answering Affidavits.....                    | _____    |
| Replying Affidavits on Motion.....           | _____    |

Plaintiff Jose Roman commenced the instant action against defendants 360 Builders, LLC ("360 Builders"), RAL Development Services, LLC ("RAL") and 360 Brooklyn Investors, LLC ("360 Brooklyn") to recover for injuries he allegedly sustained when he fell from a ladder while

performing construction work at a building located at 360 Furman Street, Brooklyn, New York (hereinafter the “premises” or the “building”) on May 19, 2008. Third-party defendant Gateway Acoustic Corporation (“Gateway”) now moves for an order pursuant to CPLR § 3212 for summary judgment dismissing that portion of third-party plaintiffs’ complaint which alleges a cause of action for common law indemnification on the ground that the plaintiff has not sustained a “grave injury” as defined by Workers’ Compensation Law § 11. Plaintiff cross-moves for an order (a) pursuant to CPLR § 3212 for summary judgment against 360 Builders and 360 Brooklyn (hereinafter “360 defendants”) on the issue of liability pursuant to Labor Law §§ 240(1) and 241(6); and (b) setting the matter down for trial against said defendants as to damages only. For the reasons set forth below, both Gateway’s motion and plaintiff’s cross-motion are granted.

The relevant facts are as follows. Defendants RAL, 360 Builders and 360 Brooklyn are the owners of the premises. 360 Builders was the general contractor at the site on the day of the accident. The contractors were performing a gut rehabilitation of a one million square foot building that was being converted from industrial to residential and mixed use (the “Project”). Gateway was hired as a subcontractor by the owners to perform “all work that is under the jurisdiction of the drywall/carpentry trade.” Plaintiff was an employee of Gateway on the date of his accident.

Plaintiff alleges that on the date of his accident, he was instructed by his Gateway supervisor, Aurelio, to tape the walls of the closets in some of the apartments in the building. This job entailed climbing a ladder in order to tape the higher portions of the walls inside the closet above the top of the doorframe. Plaintiff alleges that Aurelio provided him with a 12-foot A-frame ladder to use for the job and that the opened ladder was positioned in the closet parallel

[\* 4]

to the back wall such that the steps of the ladder were on the left side of the closet and the other leg of the ladder was on the right side of the closet. It is undisputed that plaintiff was not provided with any safety lines or harnesses to support him while he worked.

Plaintiff alleges that while he was standing on the eighth step of the ladder and applying compound and tape to the wall above the opening of the closet doorway, he felt the ladder begin to tip to the right toward the opening of the closet door. He alleges that he was not leaning to the right when the ladder began to tip. As the ladder tipped to the right, plaintiff tried to grab onto the sheetrock but did not have enough time to do so. The ladder fell to the right all the way to the floor and plaintiff was brought to the floor with it. When plaintiff fell, his upper left body, including his left shoulder, rib cage and left arm made contact with the floor. Plaintiff allegedly sustained injuries to his left shoulder, left arm, left hand, left ribs and right foot, including a fracture of his left arm. Plaintiff received Workers' Compensation benefits from Gateway's Worker's Compensation carrier as a result of the accident.

Plaintiff brought the instant action against defendants alleging causes of action for negligence, violation of Labor Law § 200, violation of Labor Law § 240(1) and violation of Labor Law § 241(6). The defendants and third-party plaintiffs served a third-party summons and complaint against third-party defendants Gateway and Newmark Construction Services, LLC ("Newmark") alleging claims for common-law indemnification, contractual indemnification and breach of contract for failure to procure insurance.

The court first turns to Gateway's motion for an order pursuant to CPLR § 3212 for summary judgment dismissing that portion of the third-party complaint which alleges a cause of action for common law indemnification on the ground that the plaintiff has not sustained a "grave injury" as defined by Workers' Compensation Law § 11. Pursuant to Workers'

Compensation Law § 11,

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury."

Workers' Compensation Law § 11. Workers' Compensation Law § 11 provides that a "grave injury" shall mean one or more of the following:

death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

*Id.* The only determination to be made in evaluating whether a plaintiff suffered a "grave injury" is whether the injuries fall within the statute's narrow objective requirement. *See Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398 (2001). The Court of Appeals has determined that "the grave injuries listed are both narrowly and completely described. The list is exhaustive, not illustrative, it is not intended to be extended absent further legislative action." *Id.* at 492.

In the instant case, Gateway has established its prima facie right to summary judgment dismissing that portion of the third-party complaint alleging a cause of action for common-law indemnification as it has demonstrated that plaintiff did not suffer a "grave injury." As an initial matter, it is undisputed that plaintiff was an employee of Gateway at the time of his accident and that he was acting within the scope of his employment for Gateway when his accident occurred. To establish that plaintiff did not suffer a grave injury, Gateway points to the list of injuries set forth in plaintiff's bill of particulars, none of which falls into the statutory definition of "grave

injury.” Plaintiff alleges a fractured left wrist and soft tissue injuries to his fingers, back, ribs, shoulder, forearm and foot. Plaintiff does not allege that he suffered any of the injuries enumerated in the statute nor does he claim a total permanent disability of any kind. Based upon the bill of particulars, the court finds that Gateway has met its burden of establishing the absence of a “grave injury.” *See Barbieri v. Mount Sinai Hospital*, 264 A.D.2d 1 (1<sup>st</sup> Dept 2000)(employer met his burden of showing the absence of a grave injury through plaintiff’s pleadings as amplified by the bill of particulars...). As third-party plaintiffs have failed to raise an issue of fact as to whether plaintiff suffered a “grave injury” pursuant to Workers’ Compensation Law § 11, Gateway’s motion must be granted.

The court next turns to plaintiff’s cross-motion for an order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability pursuant to Labor Law §§ 240(1) and 241(6). On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1<sup>st</sup> Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

As an initial matter, plaintiff has established his *prima facie* right to partial summary judgment on the issue of liability pursuant to Labor Law § 240(1). Pursuant to Labor Law §240(1),

All contractors and owners and their agents . . . who contract for but

do not control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing 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, 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.

Labor Law §240(1) was enacted to protect workers from 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 materials or load being hoisted or secured. *See Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). “Where a ladder is offered as a work-site safety device, it must be sufficient to provide proper protection. It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation of Labor Law § 240(1). *Kijak v. 330 Madison Ave. Corp.*, 251 A.D.2d 152, 153 (1<sup>st</sup> Dept 1998), citing *Schultze v. 585 W. 214<sup>th</sup> St. Owners Corp.*, 228 A.D.2d 381 (1<sup>st</sup> Dept 1996). Further, “[i]t 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. 37<sup>th</sup> St. Realty Corp.*, 292 A.D.2d 289, 291 (1<sup>st</sup> Dept 2002).

In the instant action, plaintiff has established his prima facie right to partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) as plaintiff has shown that his injury occurred due to the 360 defendants’ failure to provide an adequate safety device to prevent plaintiff from falling to the ground after the ladder he was standing on tipped over in violation of

Labor Law §240(1). Here, plaintiff's injury clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto the tipping ladder on which the plaintiff was standing. There is no explanation for the accident other than the fact that the ladder was improperly secured thus causing it to tip over and causing plaintiff to fall and become injured. It was foreseeable that a worker could fall and injure himself if the ladder was not properly secured. The fact that the ladder did tip over and caused plaintiff to fall to the ground below is proof that there was a failure to provide adequate safety devices to protect plaintiff from such a fall pursuant to Labor Law § 240(1).

In response, the 360 defendants have failed to raise an issue of fact sufficient to defeat plaintiff's motion for summary judgment. The 360 defendants' assertion that plaintiff is not entitled to summary judgment because the ladder he was using at the time of his accident was not defective in any way is without merit. The 360 defendants contend that because it is undisputed the ladder on which plaintiff was standing had four rubber footings, there exists an issue of fact as to whether the ladder was defective. However, it is well settled that a plaintiff is not required to show that a ladder was defective in some way as part of his prima facie case for summary judgment. *See McCarthy v. Turner Constr. Inc.*, 52 A.D.3d 333 (1<sup>st</sup> Dept 2008). Once a plaintiff makes a prima facie showing that the ladder he was using fell or collapsed, there is a presumption that the ladder was an inadequate safety device. *See Dowling v. McCloskey Community Service Corp.*, 45 A.D.3d 1232 (3d Dept 2007). Moreover, evidence submitted by defendants that the ladder was structurally sound and not defective is not relevant to the issue of whether it was properly placed or safe. *See Evans v. Syracuse Model Neighborhood Corp.*, 53 A.D.3d 1135 (4<sup>th</sup> Dept 2008).

Further, the 360 defendants' assertion that there exists an issue of fact as to whether

plaintiff's accident involved a gravity-related hazard is also without merit. The 360 defendants contend that the height from which plaintiff fell was at most 3 feet, 3 inches and that such a distance is de minimis and cannot be considered a gravity-related hazard. In support of this assertion, the 360 defendants submit the affidavit of Vincent Cangelosi, an architect with the firm CDA, LLC, the architectural firm that designed the building. In his affidavit, Mr. Cangelosi affirms that the height of the finished ceiling of Apartment 1018, where plaintiff was working at the time of his accident, is 9 feet as measured from the floor to the ceiling. Further, Mr. Cangelosi affirms that the height of the doorway of all closets in Apartment 1018 is 8 feet as measured from the floor to the top of the doorway. Thus, the 360 defendants assert that plaintiff could not have been working on the eighth rung of a 12 foot A-frame ladder and could not have had very far to fall, thereby precluding him from asserting a violation of Labor Law § 240(1). However, while Mr. Cangelosi may be correct that the finished ceiling height of the room where plaintiff was working was just 9 feet, plaintiff has testified that at the time of his accident, the height of the ceiling was 18 feet because the ceiling had not yet been installed. The 360 defendants have not submitted any evidence that the ceiling height at the time of plaintiff's accident was less than 18 feet or that the ceiling had already been installed at the time of plaintiff's accident.

Moreover, even if the 360 defendants' assertion that plaintiff only fell from a height of 3 feet, 3 inches was plausible, a 3 foot, 3 inch fall is not de minimis under New York law. It is well settled that there is no bright-line minimum height differential that determines whether an elevation hazard exists. See *Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1 (1<sup>st</sup> Dept 2011). In a case alleging a § 240(1) violation, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from

a physically significant elevation differential.” *Runner v. New York Stock Exchange, Inc.*, 13 N.Y.3d 599 (2009). Further, courts have held that a fall from a distance of less than 3 feet constituted a significant elevation differential. *See Arrasti v. HRH Const. LLC*, 60 A.D.3d 582 (1<sup>st</sup> Dept 2009)(holding that a fall of only 18 inches from a ramp was a significant elevation differential within the meaning of Labor Law § 240(1)); *see also Vurchio v. Kalikow Lincoln Dev. Co.*, 187 A.D.2d 280 (1<sup>st</sup> Dept 1992)(upholding an award of partial summary judgment pursuant to Labor Law § 240(1) to a plaintiff that fell two and a half feet from a saw horse that collapsed.) Finally, courts have routinely found that falls from ladders fall under the realm of gravity-related hazards contemplated by § 240(1) as elevation-related risks associated with ladders are foreseeable. *See Torres v. Monroe College*, 12 A.D.3d 361 (1<sup>st</sup> Dept 2004); *see also Rieger v. 303 East 37 Owners Corp.*, 49 A.D.3d 347 (1<sup>st</sup> Dept 2008). Thus, as the 360 defendants have failed to raise an issue of fact as to whether plaintiff’s injuries occurred due to their failure to provide an adequate safety device in violation of Labor Law §240(1), plaintiff’s motion for partial summary judgment must be granted.

Additionally, plaintiff has established his prima facie right to partial summary judgment on the issue of liability pursuant to Labor Law § 241(6). Pursuant to Labor Law § 241(6),

All contractors and owners and their agents...when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

(6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

In order to support a cause of action under Labor Law § 241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of a New York Industrial Code provision that is applicable under the circumstances of the accident and that sets forth a concrete standard of conduct rather than a mere reiteration of common law principles. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993).

In the instant action, plaintiff has established his prima facie right to partial summary judgment pursuant to Labor Law § 241(6) as he has demonstrated that his injuries were proximately caused by a violation of the New York Industrial Code. Specifically, plaintiff alleges a violation of New York Industrial Code § 23-1.21(e)(3) which states: "(3) Stepladder footing. Standing stepladders shall be used only on firm, level footings. When work is being performed from a step of a stepladder 10 feet or more above the footing, such stepladder shall be steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means." See 12 NYCRR 23-1.21(e)(3). This provision has been held to be specific enough to support a Labor Law claim pursuant to § 241(6) (*see Hart v. Turner Constr. Co.*, 30 A.D.3d 213 (1<sup>st</sup> Dept 2006)) and would apply to the circumstances, as alleged by plaintiff, where an injury was proximately caused by a fall from an unsecured stepladder while performing work 10 feet or more above the footing of such stepladder. Plaintiff alleges he was working on the eighth rung of a 12 foot A-frame stepladder and was working at a height above ten feet, as he alleges the height of the ceiling was 18 feet at the time of his accident. Thus, as required by Industrial Code § 23-1.21(e)(3), the ladder should have been steadied by a person or by mechanical means. It is undisputed that neither method was used to steady or secure the ladder.

In response, the 360 defendants have failed to raise an issue of fact as to whether they

violated Industrial Code § 23-1.21(e)(3). The 360 defendants assert that there exists an issue of fact as to whether defendants violated Industrial Code § 23-1.21(e)(3) because the height of the finished ceiling in the room where plaintiff was working is only 9 feet based on the affidavit of Mr. Cangelosi. However, as previously explained, plaintiff has testified that at the time of his accident, the height of the ceiling was 18 feet as the ceiling had not yet been installed. The 360 defendants have not submitted any evidence to raise an issue of fact as to whether the height of the ceiling was less than 18 feet at the time plaintiff's accident occurred. Thus, plaintiff's motion for partial summary judgment pursuant to Labor Law § 241(6) must be granted.

Accordingly, Gateway's motion for an order pursuant to CPLR § 3212 for summary judgment dismissing that portion of the third-party complaint which alleges common-law indemnification is granted. Plaintiff's cross-motion for an order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability pursuant to Labor Law §§ 240(1) and 241(6) is also granted against defendants 360 Builders, LLC and 360 Brooklyn Investors, LLC only. This constitutes the decision and order of the court.

Dated: 11/5/12

Enter:                     

J.S.C.

**FILED**

NOV 08 2012

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