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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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JACKSON BARRETT,

Plaintiff,

-against-

Index No.: 5977/2010

Motion Date: April 22, 2013

LEON D. DEMATTEIS CONSTRUCTION CORPORATION & DEMATTEIS ORGANIZATIONS,

Seq. No.: 1

Defendants.
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The following papers numbered 1 to 8 were read on the motion of the plaintiff, seeking summary judgment pursuant to CPLR3212, on the issues of plaintiff's Labor Law §§§ 240(1), 241(6) and 200, as well as common law negligence claims.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	1 - 3
Opposition Affirmation - Memo - Exhibits.....	4 - 6
Reply Affirmation - Exhibits.....	7 - 8

Plaintiff seeks to recover pursuant to Labor Law §§§ 240(1), 241(6) and 200 and common law negligence, for injuries sustained on January 21, 2009, when he fell from an unsecured ladder while working as a concrete laborer at a construction site for non-party Darcon Construction, Inc. ("Darcon"). The defendant Leon D. DeMatteis Construction Corporation ("DeMatteis") was the general contractor for construction on the subject building. Plaintiff alleges the accident occurred while he was descending the ladder carrying a five-gallon bucket filled with hardware. He contends that not only did the ladder move and shift, both the ladder and the ground upon which it was placed were wet, icy and slippery, causing him to fall. Subsequent to the accident, OSHA issued two citations with regard to said accident, to his employer, Darcon; one for failing to have hoisting equipment available to lower the materials, and another for the ladder itself having a broken siderail.

Plaintiff submits the pleadings, the deposition testimonies of the defendant's construction superintendent, Charles Bowers ("Bowers"), the plaintiff himself, and the affidavits of two

witnesses identified by the defendants: John O'Shea and Clovis Walker, both co-workers employed by non-party Darcon who were at the scene at the time of plaintiff's fall. Both affidavits confirm plaintiff's testimony that the plaintiff fell when the ladder moved and shifted; that the ladder was unsecured both at the top and at the base; that the floor surface upon which the ladder rested was wet, icy and slippery; that the ladder itself was wet and slippery, and furthermore, that there was no wheel hoist or pulley for the plaintiff to avail himself of for purposes of lowering the bucket filled with hardware. In addition to copies of the OSHA citations is a copy of the defendant's own incident report dated two days after the date of the actual injury, containing the names of the two witnesses. Also submitted is the affidavit of George S. Kennedy ("Kennedy"), plaintiff's safety expert. Mr. Kennedy averred that a review of the evidence indicated that the plaintiff fell approximately ten feet while carrying a five-gallon bucket filled with hardware, as he was descending an unsecured, wet and slippery extension ladder positioned upon an icy, slippery, wet floor. He further stated that the ladder was unsafely positioned at an improper angle.

Labor Law 240(1) creates a duty that is nondelegable and a general contractor who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work. (see *Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993].) The "exceptional protection" provided for workers by section 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. (*see Ross v Curtis-Palmer Hydro-Electric Co.,* supra; *Rocovich v Consolidated Edison Co.*,78 NY2d 509 [1991]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985].) The legislative purpose behind section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the general contractor instead of on workers who are "scarcely in a position to protect themselves from accident." (see *Rocovich v Consolidated Edison*, supra) Although the "special hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (see *Ross v Curtis-Palmer Hydro-Electric Co., supra*; *Rodriguez v Tietz Center for Nursing Care*, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed" (*Ross v Curtis-Palmer Hydro-Electric Co.,* supra.)

In order to prevail upon a claim pursuant to Labor Law 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 553-555 [2006]; *Weininger v Hagedorn & Co.*, 91 NY2d 958 [1998]; see also *Cahill v Triborough Bridge & Tunnel Auth*., 4 NY3d 35 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City,* 1 NY3d 280 [2003]; *Marin v Levin Props., LP*, 28 AD3d 525 [2006]). Here, the plaintiff made a prima facie showing of his entitlement to judgment on the issue of liability on the cause of action alleging a violation of Labor Law 240(1). (see, *Paganini v Congregation Eretz H'Chaim*, 105 AD3d 830 [2d Dept. 2013]["defendant violated Labor Law § 240(1) when it provided (plaintiff) with a wet, unsecured ladder lacking rubber feet, and that the violation proximately caused the ladder to shift and the plaintiff to fall to the ground"]; *Cuentas v Sephora USA, Inc*., 102 AD3d 504 [1st Dept. 2013]; *Canas v Harbor at Bluepoint Homeowners Association, Inc*., 99 AD3d 962 [2d Dept. 2012]; *Kaminski v 22-61 42nd Street, LLC*, 91 AD3d 606 [2d Dept. 2012].)

In opposition, defendant failed to raise a triable issue of fact, arguing that the weight of the evidence submitted is insufficient to support plaintiff's claim. Defendant contends that inasmuch as it has not yet deposed the witnesses, O'Shea and Walker, plaintiff's request for summary judgment is premature. However the defendant offers no explanation as to why it has not yet deposed the witnesses it identified in its own incident form dated two days after the date of the accident in the more than two years since the commencement of the action, and further, after the so-ordered stipulation dated May 10, 2012, wherein the underlying action was stayed pending completion of discovery. Defendant's otherwise speculative assertions that plaintiff was the sole proximate cause of the accident also fail to raise any question of fact.

Accordingly, as to that branch of plaintiff's motion seeking recovery pursuant to Labor Law 240(1), same is granted.

Labor Law 241(6) imposes a nondelegable duty upon general contractors to provide reasonable and adequate protection and safety to construction workers. (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 878 [1993].) In order to establish his Labor Law 241(6) claim, plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable given the circumstances of the accident, and which sets forth a concrete or "specific" standard of conduct, rather than a provision which merely incorporates common-law standards of care. (*Ross v Curtis-Palmer Hydro-Elec. Co.*, supra; *Ares v State*, 80 NY2d 959 [1992]; *Fair v 431 Fifth Avenue Assocs.*, 249 AD2d 262 [1998]; *Vernieri v Empire Realty Co.*, 219 AD2d 593 [1995]; *Adams v Glass Fab*, Inc., 212 AD2d 972 [1995].) Plaintiff must also present some factual basis from which a court may conclude that the regulation was in fact violated. (*Herman v St. John's Episcopal Hospital*, 242 AD2d 316 [1997]; *Creamer v Amsterdam H.S.*, 241 AD2d 589 [1997].)

Here, plaintiff contends that the applicable Industrial Code regulation, 12 NYCRR 23-1.21(b)(4)(i), sets forth the requirement that ladders used regularly must be "nailed or otherwise securely fastened in place." Subdivision 4(ii) requires that ladders not be used on a slippery surface and further, that footings must be firm, and subdivision 4(iv) provides "when work is being performed from rungs higher than ten feet above the ladder footing, mechanical means for securing the upper end of such ladder against sideslip are required, and the lower end of such ladder shall be held in place by person unless such lower end is tied to a secure anchorage or safety feet are used." To the extent plaintiff was utilizing the ladder as a means of egress, and not actually performing any work while on the ladder, subsection 4(iv) is inapplicable. However, to the extent plaintiff was utilizing the ladder as a means of access between the floors, subsections 4(i) and (ii) are applicable. Thus, provision 12 NYCRR 23-1.21(b)(4)(v), requiring the upper end of any ladder leaning against a slippery surface be mechanically secured against side shift, is also applicable under the facts in this instance. (See, Melchor v Singh (90 AD3d 866 [2d Dept. 2011].)

The evidence relied upon by the plaintiff supports his contention that the ladder in question was not properly secured at either the top or base as it rested on the floor. Defendant asserts that the pictures it relies upon in opposition prove that the ladder was properly secured. Plaintiff argues that such photographs depict neither the actual ladder nor the specific location of

where the accident occurred. Defendant alleges that the testimony of Bowers, supports their claim that the photographs accurately reflect the particular ladder and location as it was on the date in question. However, Bowers testified that he had no he had no independent memory of the accident; that if it had been raining on the day in question, that the ladder and surrounding ground would have been wet; and further, when asked specifically "[d]id you observe whether or not the ladder was secured in any fashion of the 25th floor? [Bowers responded] I cannot recall exactly what I have done. . . .I cannot tell you that I definitely [did] . . . I don't recall."

Plaintiff also relies upon 12 NYCRR 23-1.7(d), which sets forth the regulation concerning slipping hazards. Specifically, it states that "[e]mployers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, . . . which may cause slippery footing shall be removed, sanded or covered to provide safe footing." Although defendant contends that this section is inapplicable because the plaintiff failed to prove that the floor beneath the ladder qualified as a "passageway", the regulation does not require such. This court finds that the fact that the ground directly beneath the ladder was in a slippery condition sufficient to hold that subsection 1.7(d) applies.

Accordingly, as to that branch of plaintiff's motion seeking recovery pursuant to Labor Law 241(6), same is granted.

In order to establish liability for common-law negligence or a violation of Labor Law 200, the plaintiff must establish that the defendant in issue had "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Picciano & Son*, 54 NY2d 311 [1981]; *see Rizzuto v Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Singleton v Citnalta Constr. Corp*., 291 AD2d 393 [2d Dept. 2002]), or had actual or constructive notice of the defective condition causing the accident (*see LaRose v Resinick Eighth Ave. Assoc., LLC*, 26 AD3d 470 [2d Dept. 2006]; *Gatto v Turano*, 6 AD3d 390 [2d Dept. 2004]; *Abayev v Jaypson Jewelry Manufacturing Corp.*, 2 AD3d 548 [2d Dept. 2003]; *Duncan v Perry*, 307 AD2d 249 [2d Dept. 2003]; *Giambalvo v Chemical Bank*, 260 AD2d 432 [2d Dept. 1999]; *Cuartas v Kourkoumelis*, 265 AD2d 293 [2d Dept. 1999]; *Sprague v Peckham Materials Corp*., 240 AD2d 392 [2d Dept. 1997].) "General supervisory authority at a work site for the purpose of liability overseeing the progress of the work and inspecting the work product is insufficient to impose for common-law negligence and under Labor Law 200."(*Dos Santos v STV Engrs*., *Inc.*, 8 AD3d 223 [2d Dept. 2004], *lv denied* 4 NY3d 702 [2004].) Further, the authority to review safety at the site is insufficient if there is no evidence that the defendant actually controlled the manner in which the work was performed. (*see Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464 [2d Dept. 2000].)

Plaintiff relies upon Bowers' testimony, wherein he stated that the defendant had a "site safety manager that is employed by us, being DeMatteis, on site at all times, whose primary focus is safety on the job site." Absent any other evidence to support plaintiff's claim, such testimony alone is insufficient to support that branch of plaintiff's motion seeking summary judgment pursuant to Labor Law 200. *(see Ross v Curtis–Palmer Hydro–Elec. Co.*, supra.) There is no evidence that the defendant gave any instructions on what needed to be done, how to do it,

and/or monitoring and oversight of the timing and quality of the work . (*See Dalanna v City of New York*, 308 A.D.2d 400 [1ST Dept. 2003].) A general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons has been held insufficient to impose such liability. (*Paz v City of New York*, 925 N.Y.S.2d 453 [1st Dept. 2011]; *Samaroo v Patmos Fifth Real Estate, Inc*., 32 Misc.3d 1209(A), Slip Copy, 2011 WL 2636257 N.Y.Sup. June 2011].) In the present case, there is absolutely no proof in the record that the defendant exercised any control over how the plaintiff or his employer accomplished the tasks they were contracted to complete. Even if the defendant had representatives present during the work who exercised general supervisory duties over the project this would not give rise to liability as there was no proof adduced that the defendant had "actual authority to control the activity [that brought] about the injury." (*Reilly v Newireen Associates*, 303 AD2d 214 [1st Dept. 2003]; see also, *Martin v Paisner*, 253 AD2d 796 [2d Dept. 1998]; *Putnam v Karaco Industries Corporation*, 253 AD2d 457 [2d Dept. 1998].)

Accordingly, as to that branch of plaintiff's motion seeking summary judgment pursuant to Labor Law 200, same is denied.

Dated: May 29, 2013

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SIDNEY F. STRAUSS, J.S.C.