Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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CHUNLIN JIN,

Plaintiff, **Index No.: 3778/11**
Mot. Date: 2/11/13

-against- **Mot. Cal. No. 48**
Mot. Seq. 3

TENRIKYO MISSION NEW YORK CENTER, INC. d/b/a TENRIKYO MISSION NEW YORK,

Defendant.

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The following papers numbered 1 to 10 read on this motion by plaintiff CHUNLIN JIN for an order granting summary judgment on the issue of liability on its Labor Law Sections 240(1) and 241(6) claims and against the defendant.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-7
Reply Affirmation	8-10

Upon the foregoing papers, it is ordered that the motion is granted.

The plaintiff moves for summary judgment on the issue of liability on its Labor Law Sections 240(1) and 241(6) causes of action. The facts of this case are simple, essentially uncontested, and unfortunate.

At the time of the accident, October 10, 2010, the plaintiff was employed by the defendant to demolish two storage sheds at the rear of their property. While removing the roof of one of the sheds, the roof support collapsed, and the plaintiff fell approximately 8-1/2 feet to the ground, sustaining personal injuries. It is undisputed that the defendant never supplied the plaintiff with any safety supplies or equipment. On that basis, the plaintiff moves for partial summary judgment on liability on its Labor Law Section 240

and 241(6) claims. The defendant opposes, claiming that it is exempt from liability pursuant to the one or two-family exemption to liability under Labor Law §§240(1) and 241(6), since the property in question is a single-family residence, rather than a commercial church property.

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept. 2006], quoting Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept. 2006]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; DeRosa v City of New York, 30 AD3d 323, 325 [1st Dept. 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corporation, 298 AD2d 224, 226 [1st Dept. 2002]).

Labor Law § 240(1), also known as the "Scaffold Law" (Ryan v Morse Diesel, 98 AD2d 615, 615 [1st Dept. 1983]), provides, in relevant part:

> All contractors and owners and their agents … in the erection, demolition, repairing, altering, painting … shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists … 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 designed to prevent those types of accidents in which the scaffold … or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 [1st Dept. 2001], quoting Ross v Curtis-Palmer Hydro-Electric Company, 81 NY2d 494, 501 [1993]). In order to prevail on a Section 240(1) claim, the plaintiff must show that the statute was violated and that this violation was a proximate cause of the plaintiff's injuries (Blake v Neighborhood

Housing Services of New York City, 1 NY3d 280, 287 [2003]; Felker v Corning Inc, 90 NY2d 219, 224-225 [1997]; Torres v Monroe College, 12 AD3d 261, 262 [1st Dept. 2004]).

Labor Law § 240(1) imposes a non-delegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks (see Ross v Curtis-Palmer Hydro-Elec. Co.., 81 NY2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49; Barr v 157 5 Ave., LLC, 60 AD3d 796, 875 N.Y.S.2d 228). "To impose liability pursuant to Labor Law § 240(1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries" (Tama v Gargiulo Bros., Inc., 61 AD3d 958, 960 [2d Dept. 2009]; see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 287 [2003]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" (Treu v Cappelletti, 71 AD3d 994, 997 [2d Dept. 2010]).

Labor Law § 240(1) and § 241(6) contain identical language exempting from the statutes "owners of one and two-family dwellings who contract for but do not direct or control the work" (compare Labor Law § 240[1] with § 241[6]). The exception was enacted to protect those who, lacking business sophistication, would not know or anticipate the need to obtain insurance to cover them against absolute liability (see Acosta v Hadjigavriel, 18 A.D.3d 406, 406-407 (N.Y. App. Div. 2d Dept. 2005); Lombardi v Stout, 80 NY2d 290, 296, 604 NE2d 117, 590 NYS2d 55 [1992]; (see, 78 NY2d 880, 882, 577 NE2d 1035, 573 NYS2d 443 [1991]; Milan v Goldman, 254 AD2d 263, 264, 678 NYS2d 129 [1998]).

In order for a defendant to receive the protection of the homeowners' exemption, the defendant must satisfy two prongs required by the statutes. First, the defendant must show that the work was conducted at a dwelling that is a residence for only one or two families (see Labor Law § 240[1]; § 241; see generally, Mandelos v Karavasidis, 86 NY2d 767, 768-769, 655 NE2d 174, 631 NYS2d 133 [1995]; Moran v Janowski, 276 AD2d 605, 606 [2d Dept. 2000]). Here, the property in question indisputably housed a number of unrelated individuals associated with the church[1]. There is nothing in the

[1] Likely a violation of the applicable building code.

record to suggest that these individuals were one or two "family" units.

More importantly, the property in question was a "mixed use" structure, thereby raising the issue of its entitlement to the residential exemption.

In Bartoo v Buell, (87 NY2d 362 [1996]) the issue presented to the Court of Appeals was whether the homeowner exemption of N.Y. Lab. Law §§ 240(1), 241(6), applied to a structure jointly used for residential and commercial purposes. The Court employed a flexible "site and purpose" test to determine whether the exemption applies, noting that where a building, though structurally a one-family dwelling, was used by its owner exclusively for commercial purposes, the exemption would not apply. Moreover, the Court concluded that "when an owner of a one-or two-family dwelling contracts for work that directly relates to the residential use of the home, even if the work also serves a commercial purpose, that owner is shielded by the homeowner exemption from the absolute liability of Labor Law §§ 240 and 241" (Bartoo, supra at 368).

For example, in Muniz v Church of Our Lady, (238 AD2d 101 [1st Dept. 1997]) in which the plaintiff was injured while removing a window in the kitchen of the defendant church's rectory, the First Department stated

> It is clear that the rectory here is, first and foremost, the residence of the parish priests. The mere fact that parts of the rectory are used for nonresidential purposes in connection with certain Church-related work does not automatically deprive the Church of the benefit of the exemption. Rather, where a single structure is used for both residential and commercial or business purposes, the site and purpose of the injured plaintiff's work must be analyzed in order to determine whether the exemption applies . . . Where the work contracted for relates to the residential nature of the premises--even if the work will fortuitously benefit the commercial use of the premises--the exemption is applicable . . .In the case before us, the work contracted for--the replacement of two windows in the parish house kitchen--was wholly related to the residential nature of the rectory; the kitchen served no purpose in connection with the incidental Church business conducted on the premises. Under Bartoo and Anderson (supra), therefore, the defendant is entitled to invoke the benefit of the statutory exemption.

(Muniz, supra at 102-103; see also Uddin v Three Bros. Constr. Corp., 33 AD3d 691 [2d Dept. 2006] [*single-family dwelling used solely as a residence for its pastor and his*

wife, where no church business was conducted from the building was entitled to the exemption]; but see Zapata v Riverside Study Ctr., Inc., 2012 U.S. Dist. LEXIS 69246 [SDNY 2012]).

Similarly, in Castellanos v United Cerebral Palsy Assn. of Greater Suffolk, Inc., 77 AD3d 879, 880 (2d Dept. 2010), the homeowner's exemption under Labor Law § 240 (1) and § 241(6) was available where the building was a single-family dwelling used solely as a residence for six disabled individuals who lived together and functioned as a family unit (see Mental Hygiene Law § 41.34 [f]), and that the home was not an income-producing property, as any commercial benefit the nonprofit defendant may have obtained from Medicare, Medicaid, or Social Security was ancillary to the residential purpose of the home.

The common thread in these cases is whether the work performed primarily relates to or benefits the residential use of the premises or the commercial use of the premises. In the case of a church, where the work primarily relates to its use as a residence, and no church business transpires in the area of the work performed, the exemption will apply (Muniz, supra at 102-103.)

In the case at bar, the Court finds, based on the testimony of the defendant, that this structure's primary use was that as a church, and that its use as a dormitory was incidental to that purpose. (See Krukowski v Steffensen, 194 AD2d 179 [2d Dept. 1993]; cf. Assevero v Hamilton & Church Props., LLC, 35 Misc. 3d 1222[A], 1222A [Sup. Ct. Kings Co.2012]). The facts demonstrate that the commercial use of the building as a functioning church where services, club meetings, and bazaars were held completely overwhelms the incidental residential use of the premises. In addition, the two large sheds which the plaintiff was demolishing at the time of his injury were used to store furniture and tables used in church services. The record is devoid of any evidence to the contrary proffered by the defendant.

The deposition testimony of Defendant's president, Mr. Toshihiko Okui, furnishes the salient facts upon which the Court bases its decision. He testified, inter alia:

1. that the premises were the New York “headquarters”of the defendant church (Okui Tr. at pp. 25-28);

2. that 120 people per service attended services at the premises (Ibid. at p. 25).

3. that four missionaries, a secretary and his wife, and Mr. Okui and his wife, the director of the cultural center and the assistant to the minister worked there (Ibid. at p. 28);
4. that the church was open every day from 6:30 a.m. to 9:30 p.m. (Ibid. at p. 32);
5. that the church web site listed the premises as its headquarters (Ibid. at p. 33);
6. that the premises was the meeting place for a boys and girls club where the children played games, learned, and learned to play instruments.
(Ibid. at pp. 42-43)
7. that the rear of the premises was a gravel church parking lot (Ibid. at p. 46-47);
8. that the two sheds on the premises were used to store folding tables and furniture owned by the church (Ibid. at pp. 69-70). The tables were used in church services. (Ibid. at p. 55).
9. that the premises were used to conduct church bazaars and church garage sales (Ibid. at pp. 44-45). The bazaar was held inside the premises (Ibid. at 25).

In addition, the deed to the premises, dated December 8, 1980, transferred the premises from Tenrikyo Mission Headquarters in America of Los Angeles to Tenrikyo Mission, New York Center, Inc. and was signed by "Bishop Yasuhito Shinomori."

Work performed on a church structure relating to the commercial use of the premises as a church resulting in a fall and injuries to the plaintiff comes within the ambit of Labor Law § 240(1)(see Kun Yong Ke v Oversea Chinese Mission, Inc., 49 AD3d 508, 509 [2d Dept. 2008]; Poracki v St. Mary's Roman Catholic Church, 82 AD3d 1192 [2d Dept. 2011]; Jimenez v RC Church of Epiphany, 85 A.D.3d 974 [2d Dept. 2011]; Nacewicz v Roman Catholic Church of the Holy Cross, 2013 NY Slip Op 2167 [2d Dept. April 2, 2013]).

In opposition, the defendant cannot sufficiently rebut the effects of his client's unequivocal statements in order to carry its burden of proof of entitlement to the exemption, or even to raise a triable issue of fact. In short, the testimony of Mr. Okui is patently clear as a matter of law that the building was being utilized as a church at the time of plaintiff's injury.

Likewise, the defendant has not raised a triable issue of fact in response to the

affidavit of professional engineer Jerome Levine, that establishes the defendant's liability under Labor Law Section 241(6) for failure to comply with New York State Industrial Code and OSHA provisions relating to demolition work. By failing to provide any safety devices whatsoever, the defendant failed to provide reasonable and adequate protection and safety to the plaintiff, in violation of Labor Law Section 241(6).

Accordingly, based upon the foregoing, the plaintiff's motion for summary judgment, based upon liability under Sections 240(1) and 241(6) of the Labor Law, is granted in all respects.

The branch of the plaintiff's request for costs, disbursements and attorneys' fees is denied, since there is no basis for such award.

This constitutes the opinion, decision and order of the Court.

Dated: May 9, 2013

TIMOTHY J. DUFFICY, J.S.C.